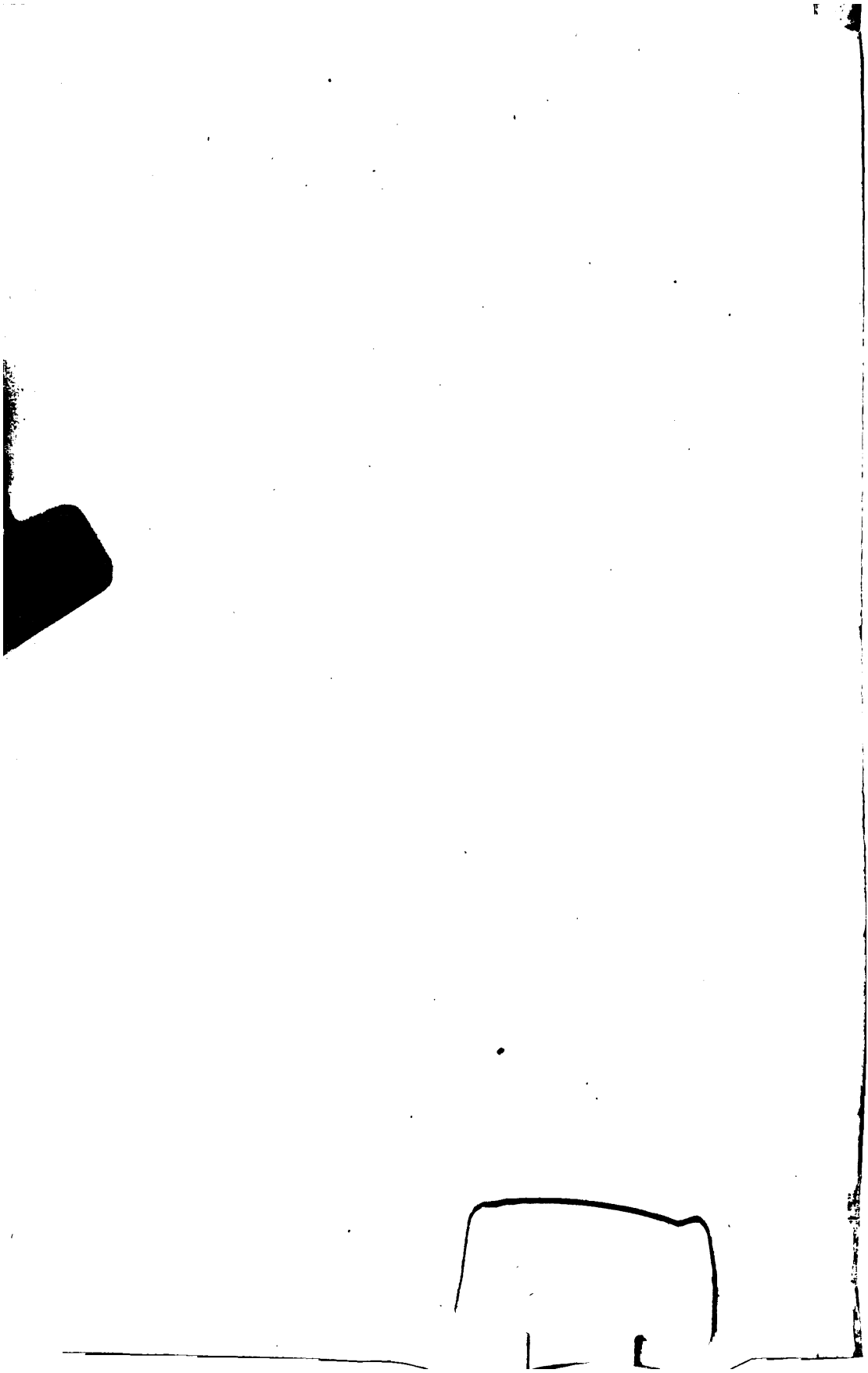
PATTEE'S
ILLUSTRATIVE CASES
IN REALTY
PART III—TITLE



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From the Proceedings of the American Bar Association, Section of Legal Education, 1893.

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ILLUSTRATIVE CASES

IN

REALTY.

BY

W. S. PATTEE, LL. D.,

DEAN OF COLLEGE OF LAW, UNIVERSITY OF MINNESOTA.

PART III.—TITLE TO ESTATES.

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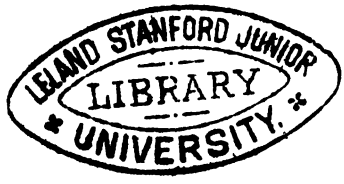

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ANALYSIS.

TABLE OF CASES.

ILLUSTRATIVE CASES

IN

REALTY.

TITLE TO ESTATES.

"Title is the means whereby the owner of estates hath the just possession of his property." 2 Bl. Comm. 195.

I

TENURE.

Land in America is, as a rule, held allodially.

MINNEAPOLIS MILL CO. *v.* TIFFANY.

Supreme Court of Minnesota, 1876.

22 Minn. 463.

CORNELL, J. Section 15, art. 1, of the Constitution declares all lands within this State to be allodial, prohibits feudal tenures of every description, with all their incidents, and makes void all leases and grants of agricultural lands thereafter made for a longer period than twenty-one years, in which shall be reserved any rent or service of any kind. It is quite evident that the framers of the Constitution did not suppose that this declaration as to the allodial character of all lands, and the prohibition of feudal tenures, with their incidents, was sufficiently broad to cover the kind of leases and grants

mentioned in the last clause of this section, without reference to the nature of the lands which might be the subject of the conveyance, else the special inhibition in respect to leases and grants of agricultural lands had been unnecessary; and in this they were clearly right. A reservation, in an allodial grant, of a definite sum, payable annually, for any length of time, whether in the way of rent for the use of the thing granted, or as a consideration for the grant itself, does not give it a feudal character. Fealty was the essential and distinguishing feature of a feudal tenure: Van Rensselaer *v.* Hays, 19 N. Y. 68; Wallace *v.* Harmstad, 44 Pa. St. 492; White *v.* Fuller, 38 Vt. 193.

It is not pretended that the subject of the grant in this instance was agricultural land, and hence the last clause of this constitutional section has no application.

2. The lease under which defendant holds contains the following, among other conditions: "Sec. 11. The grantees are not to use any buildings for, or set up or continue, any laboratory, powder mill, nor any chemical or other works whatever which may be so noxious or dangerous, from fire or otherwise, as to impair, injure, or endanger the life, safety, or reasonable comfort of any person now or hereafter living or employed in and about the land or works of the grantees or their assigns, or which shall endanger the buildings, property, or works now or hereafter placed upon the land of the grantors by themselves or others; and in case *any such* should be so set up, continued, or used, the grantors or their assigns may enter and abate them, etc., and may likewise stop the water from passing into the flumes of the party so setting up, continuing, or using *such nuisance*, until such *nuisance* be removed or discontinued. Nor are the grantors or their assigns to set up, continue, or use *any such* on their land so near that of the grantees as to cause the *above described nuisances, or either of them.* And should any such be set up, etc., the grantees and their assigns may enter and abate them, . . . and may have their action, in case of damage, against the party setting up, using, or continuing *such nuisance*, and if the same should have been

set up, used, or continued, by license from the grantors, the grantees or their assigns shall also be discharged from the payment of rent accruing during the continuance of *such nuisance.*"

It seems too clear for argument that the works intended to be prohibited by this section were such, and such only, as may properly be denominated nuisances in a legal sense. That the structure complained of in this instance—a wooden flouring mill, operated by water as a motive power—is a structure of this character is unsupported by any authority, or any legal definition of the word nuisance: Rhodes *v.* Dunbar, 57 Pa. St. 274. As this conclusion is decisive of the case, the other points raised and discussed on the argument need not be considered.

Order affirmed.

Const. Minn., Art. I, § 15; WILLIAMS, R. P. 6, note; 1 Washburn, R. P. (5th ed.), §§ 69–72; Tiedeman, R. P., § 25; 3 Kent's Comm., § 509.

1

But subject to the right of eminent domain.

TAYLOR *v.* PORTER.

Supreme Court of New York, 1845.

4 Hill, 140.

BRONSON, J. Every person liable to be assessed for highway labor may apply to the commissioners of highways of the town in which he resides to lay out a road. Whenever application is made to the commissioners for a *private road,* they are to summon twelve freeholders of the town to meet on a day certain, of which notice must be given to the owner or occupant of the land through which it is proposed to lay out the road. The freeholders, when met and sworn, are to view the lands through which the road is applied for, and if they determine that the road is necessary, they are to make and subscribe a certificate in writing to that effect, and the commis-

sioners are required thereupon to lay out the road, and cause a record of it to be made in the town clerk's office. The damages of the owner of the land through which the road is laid, if not adjusted by agreement, are to be assessed by a jury of six freeholders of some other town, and are to be paid *by the person applying for the road.* "Every such private road, when so laid out, *shall be for the use of such applicant, his heirs and assigns;* but not to be converted to any other use or purpose than that of a road. *Nor shall the occupant or owner of the land through which such road shall be laid out be permitted to use the same as a road,* unless he shall have signified his intention of so making use of the same, to the jury or commissioners who ascertained the damages sustained by laying out such road, and before such damages were so ascertained:" 1R. S. 513, §§ 54, 77–79. The road is paid for and owned by the applicant. The public has no title to nor interest in it. No citizen has a right to use the road as he does the public highway. He can only use it when he has business with the road-owner, or some other lawful occasion for going to the land intended to be benefited by the road. He can only justify an entry on the road, when he could justify an entry on the land on account of which the road was laid out. Even the owner of the land over which the road passes, unless he has given notice of such an intention before the damages are assessed, has no right to use the road for his own purpose; and if he does so, or if his fences encroach upon the road, the owner of the road may have an action against him: Lambert *v.* Hoke, 14 John. 383; Herrick *v.* Stover, 5 Wend. 580. In short, the road is the private property of the applicant. In the words of the statute, the road "shall be for the use of such applicant, his heirs and assigns."

This right of way is an incorporeal hereditament, in which the owner has an estate of inheritance. The owner of the land over which the road is laid has not lost the entire fee, but he has lost the beneficial use and enjoyment of his property forever. It is not, however, material to inquire what *quantum* of interest has passed from him. It is enough that some interest—some portion of his estate, no matter how small—has been taken

from him without his consent. The property of A. is taken, without his permission, and transferred to B. Can such a thing be rightfully done? Has the Legislature any power to say it may be done?

I will not stop to inquire whether the damages must not be paid before the title will pass. The difficulty lies deeper than that. Whatever sum may be tendered, or however ample may be the provision for compensation, the question still remains, can the Legislature compel any man to sell his land or his goods, or any interest in them, to his neighbor, when the property is not to be applied to public use? Or, must it be left to the owner to say when, to whom, and upon what terms he will part with his property, or whether he will part with it at all?

The right to take private property for *public* purposes is one of the inherent attributes of sovereignty, and exists in every independent government. Private interests must yield to public necessity. But even this right of eminent domain cannot be exercised without making just compensation to the owner of the property: Const., art. VII, § 6. And thus, what would otherwise be a burden upon a single individual, has been made to fall equally upon every member of the State. But there is no provision in the Constitution that just compensation shall be made to the owner when his property is taken for *private* purposes; and if the power exists to take the property of one man without his consent and transfer it to another, it may be exercised without any reference to the question of compensation. The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can, without his fault, be transferred to B., it way as well be done without as with a consideration. This view of the question is sufficient to put us upon the inquiry, where can the power be found to pass such a law as that under which the defendants attempt to justify their entry upon the plaintiff's land? It is not to be presumed that such a power exists, and those who set it up should tell where it may be found.

Under our form of government the Legislature is not supreme. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it can only exercise such powers as have been delegated to it; and when it steps beyond that boundary, its acts, like those of the most humble magistrate in the State who transcends his jurisdiction, are utterly void. Where, then, shall we find a delegation of power to the Legislature to take the property of A. and give it to B., either with or without compensation? Only one clause of the Constitution can be cited in support of the power, and that is the first section of the first article, where the people have declared that "the legislative power of this State shall be vested in a Senate and Assembly." It is readily admitted that the two Houses, subject only to the qualified negative of the Governor, possess all "the legislative power of this State;" but the question immediately presents itself, what is that "legislative power," and how far does it extend? Does it reach the life, liberty, or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare? In Wilkinson *v.* Leland, 2 Peters, 657, Mr. Justice STORY says: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no Court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." He added: "We know of no case in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles,

by every judicial tribunal in which it has been attempted to be enforced." See, also, 2 Kent's Com.13, 340, and cases there cited. The security of life, liberty, and property lies at the foundation of the social compact; and to say that this grant of "legislative power" includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established. If there was not one word of qualification in the whole instrument, I should feel great difficulty in bringing myself to the conclusion that the clause under consideration had clothed the Legislature with despotic power; and such is the extent of their authority if they can take the property of A., either with or without compensation, and give it to B. "The legislative power of this State" does not reach to such an unwarrantable extent. Neither life, liberty, nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the power. Such, at least, are my present impressions.

But the question does not necessarily turn on the section granting legislative power. The people have added negative words, which should put the matter at rest. "No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless *by the law of the land*, or the judgment of his peers:" Const., art. VII, § 1. The words "by the law of the land," as here used, do do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two houses, "You shall be vested with 'the legislative power of the State;' but no one 'shall be disfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose;" in other words, "You shall not do the wrong, unless you choose to do it." The section was taken with some modifications from a part of the 29th chapter of Magna Charta which provided, that no freeman should be taken, or imprisoned, or be disseised of his freehold, etc., but by lawful

judgment of his peers, or *by the law of the land.* Lord COKE, in his commentary upon this statute, says that these words, "by the law of the land," mean "by the due course and process of law;" which he afterward explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law." 2 Inst. 45, 50. In North Carolina and Tennessee, where they have copied almost literally this part of the 29th chapter of Magna Charta, the terms "law of the land" have received the same construction: Hoke *v.* Henderson, 4 Dev. 1; Jones *v.* Perry, 10 Yerger, 59; and see 3 Story on Const. U. S. 661; 2 Kent's Com. 13. The meaning of the section then seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.

But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. "No person shall be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation." In the Matter of Albany Street, 11 Wend. 149, where it was held that private property could not be taken for any other than public use, Chief Justice SAVAGE went mainly upon the implication contained in the last member of the clause just cited. He said: "The Constitution, by authorizing the appropriation of private property to public use, impliedly declares that for any other use, private property shall not be taken from one and applied to the private use of another." And in Bloodgood *v.* The Mohawk & Hudson Railroad Co., 18 Wend. 59, Mr. Senator TRACY said the words should be construed "as equivalent to a constitutional declaration that private property, without the consent of the owner,

shall be taken *only* for the public use, and then only upon a just compensation." I feel no disposition to question the soundness of these views; but still it seems to me that the case stands stronger upon the first member of the clause: "No person shall be deprived of life, liberty, or property, *without due process of law.*" The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty, and property; and if the latter can be taken without a forensic trial and judgment there is no security for the others. If the Legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." Perhaps the whole clause should be read together (Matter of John and Cherry Streets, 19 Wend. 659), and then if it do not, as I have supposed, amount to a direct prohibition against taking the property of one and giving it to another, it contains, at the least, an implication too strong to be resisted that such an act cannot be done.

Of course, I shall not be understood as saying that a trial and judgment are necessary in exercising the right of eminent domain. When private property is taken for public use the only restriction is that just compensation shall be made to the owner. But when one man wants the property of another, I mean to say that the Legislature cannot aid him in making the acquisition.

This question is only new with us in its application to private roads. That a statute is unconstitutional and void which authorizes the transfer of one man's property to another without the consent of the owner, and, although compensation is made, was adjudged by this Court in the Matter of Albany Street, 11 Wend. 149; and again in the Matter of John and Cherry Streets, 19 Ib. 659. The same doctrine was held by

the Chancellor in Varick *v.* Smith, 5 Paige, 137; and it was admitted by all the members of the Court of Errors who delivered opinions in Bloodgood *v.* The Mohawk & Hudson R. R. Co., 18 Ib. 9. I might have contented myself with referring to these cases as settling the question; but in so grave a matter as that of declaring an Act of the Legislature unconstitutional and void, I wished very briefly to assign the reasons which had conducted me to that conclusion.

There cannot be a very great number of private roads in the State; and as to most of those which exist, it is probable that the land-owners have in one form or another consented to their use. And when we consider how liberally public roads have already been opened, and how easily they may be obtained when wanted, there cannot be many indviduals who will be affected by our decision. But whatever consequences may follow, I am of opinion that a private road cannot be laid out without the consent of the owner of the land over which it passes.

Mills on Eminent Domain, § 1; Lewis on Eminent Domain, §§ 1-5; Boone, R. P., §§ 22, 256; People *v.* Salem, 20 Mich. 481; Crosby *v.* Hanover, 36 N. H. 404; Kohl *v.* United States, 91 U. S. 367.

2

And also subject to the rule, *"Sic utere tuo ut alienum non lædas."*

COMMONWEALTH *v.* TEWKSBURY.

Supreme Judicial Court of Massachusetts, 1846.

11 Met. 55.

SHAW, C. J. The defendant was indicted for taking and carrying away a quantity of sand and gravel from a beach in the town of Chelsea, contrary to the provisions of St. 1845, c. 117, which are in these words: "Any person who shall take, carry away, or remove, by land or by water, any stones, gravel, or sand from any of the beaches in the town of Chelsea, excepting," etc., "shall, for each offense, forfeit a sum not exceed-

ing $20, to be recovered, by complaint or indictment, in any Court of competent jurisdiction." The defendant, not denying the taking and carrying away of the gravel, contrary to the terms of the Act, rested his defense on two grounds. 1st. That he was owner of the land in fee, and that the statute did not intend to prohibit the owner from taking gravel from his own land. 2d. That if the statute did so prohibit the owner, for any purpose of public benefit, from taking gravel from his own land, it was a taking of the land for the public use, within the meaning of the Declaration of Rights, art. 10, viz.: that no part of the property of any individual can be taken from him or applied to public uses without making him a reasonable compensation therefor; and inasmuch as the statute made no provision for compensation to the owner, it was unconstitutional and void.

The Judge, before whom the trial was had in the municipal Court, having ruled against the defendant, and the defendant having been convicted, he filed his bill of exceptions, and these questions of law now come before this Court for revision.

The statute, though recent, is a mere revision of a former one, St. 1798, c. 73 (2 Special Laws, 283); they are alike in substance and purpose, and the only change is, in substituting an indictment for a *qui tam* action, as the mode of prosecution. The object of both is apparent, and is a very important one, to protect the harbor of Boston, by preserving the integrity of the beaches, and the natural embankments of sand and gravel by which it is bordered.

1. Does the Act extend the prohibition to the owners of the soil? In terms, it certainly does. "Any person" who does the act is made liable to the penalty. And we can perceive no ground on which an exception can be implied. The obvious purpose of the Legislature was, to prevent the natural embankments from being broken up, and that, by prohibiting the removal of the sand and gravel composing them, by anybody. If done by an owner, the damage would be as great as if done by a stranger.

The argument on this part of the case was this; that if

gravel were taken by a stranger without the consent of the owner, it would be a trespass as to him, and the intent of the Legislature probably was, to declare the private tort a public one, and subject the trespasser to a penalty to the public; in addition to his liability for damages to the owner. But we see nothing in the statute from which to infer such an intent. It is as competent for the Legislature, upon grounds of public policy, to declare an indifferent act injurious to the public, and prohibit it by penalties, as to do the same in respect to an act, which is at the same time tortious as against a private person. We can have no doubt, therefore, that it was the intention of the Legislature to prohibit the owner, as well as all other persons, from breaking up and removing the beaches and gravel banks within the prescribed limits, whether they adopted the proper and constitutional means, and acted within their constitutional powers, in order to accomplish that intent, or not.

2. But the other and far the more important question is, whether such a law is a taking, or appropriation to public use, of the land of all those who own land bordering on the seashore, within the meaning of the Declaration of Rights, and whether it is a law which the Legislature have no constitutional and legitimate authority to make, without providing compensation for such owners.

The Court are of opinion that such a law is not a taking of the property for public use, within the meaning of the Constitution, but is a just and legitimate exercise of the power of the Legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public.

All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *sic utere tuo ut alienum non lœdas.* When the injury is plain and palpable, it may be a nuisance at the common law, to be restrained and punished by indictment. As where one bordering on a navigable river should cut away the embank-

ment on his own land, and divert the water-course so as to render it too shallow for navigation. But there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a change of circumstances, the same would be quite harmless. As the use of a warehouse for the storage of gunpowder, in a populous neighborhood, or for the storage of noxious merchandise, or the use of buildings for the carrying on of noxious trades, dangerous to the safety, health, or comfort of the community. Whereas, in other situations, there would be no public occasion to restrain any use which the owner might think fit to make of his property. In such cases, we think, it is competent for the Legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public, under particular circumstances, leaving the use of similar property unlimited, where the obvious considerations of public good do not require the restraint. This is undoubtedly a high power, and is to be exercised with the strictest circumspection, and with the most sacred regard to the right of private property, and only in cases amounting to an obvious public exigency. Still, we think, the power exists, and has been long exercised in cases more or less analogous.

The right to restrain owners of land in towns from erecting wooden buildings, except under certain restrictions, has never been doubted, or, if it has been, the doubt has long since been removed. So of the like nature are all laws to regulate and restrain the erection and use of furnaces and steam engines, and buildings designed for carrying on dangerous or noxious trades.

The protection and preservation of beaches, in situations where they form the natural embankments to public ports and harbors and navigable streams, is obviously of great public importance; although on many parts of the coast the situation of the shores is such that the removal of sand and gravel, by the owner, would not be of the least injury to anybody.

The importance of such natural beaches, in a public point of view, may be estimated by the case of Plymouth Beach. The port of that ancient town was protected by a narrow strip

of land extending in front of it. In consequence of cutting away the wood upon it, or from some other cause, it was washed away and broken through by the wind and sea, and the navigation was in danger of being wholly destroyed. Under these circumstances, the public, the government both of the United States and of this Commonwealth, took measures, at great expense, to restore the beach, by artificial means, to its original condition.

The regulation of particular beaches, imposing greater or less restraint upon the use of them by the owners, has been a subject of legislation from early times. Several of these Acts, dating from periods anterior to the revolution, are to be found in the appendix to vol. 3 of the Special Laws. Some of these Acts, and especially those of modern date, and those which prohibit the owner of land from using his herbage, either by mowing or grazing, do provide for a compensation to the owner, for the damage which he may sustain under the restraints of the Act; but many of them do not so provide. It is extremely difficult to lay down any general rule, or draw a precise line between the cases where the restraint of the right of the owner is such that compensation ought to be provided, and where the regulation is such only as to prevent a particular use of the property from being a public nuisance. Without hazarding an opinion upon any other question, we think that a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port, or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an Act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the Legislature have authority to make.

Exceptions overruled.

Mears *v.* Dole, 135 Mass. 508; Fletcher *v.* Rylands, L. R. 1 Exch. 265–279; Smith *v.* Fletcher, L. R. 7 Exch. 305.

For an excellent explanation of this principle see Broom's Legal Maxims, 366, 369, 371.

II

HOW ACQUIRED AND LOST.

There are two modes of acquiring title to land: (1) By descent; (2) by purchase.

A

TITLE BY DESCENT.

Title to land by descent is that which vests by operation of law in the heir upon the death of his ancestor.

Nemo est hæres viventis.

LOBDELL *v.* HAYES.

Supreme Judicial Court of Massachusetts, 1858.

12 Gray, 236.

THOMAS, J. Upon the decease of the owner of real estate, it descends to and vests in his heirs-at-law, unless otherwise disposed of by his will. It vests in his heirs, however, subject to the payment of his debts. But until a sale is lawfully made for that purpose the heirs may enter upon the estate and receive the rents and profits. Their interest is determined only by the sale: Gibson *v.* Farley, 16 Mass. 287; Boynton *v.* Peterborough & Shirley Railroad, 4 Cush. 467.

This is true also of the estate in which the deceased had an equitable interest, which he had purchased of the city of Boston, upon which he had erected dwelling-houses, and of which he was in possession at the time of his death: Rev. Sts. c. 61, § 1; c. 74, §§ 8–14; Reed *v.* Whitney, 7 Gray, 533.

The real estate of Lobdell was disposed of by his last will and testament. In the portion devised in trust for his daughters, the heirs-at-law, as such, have of course no interest. But, in relation to so much as was devised to the widow, she, as she had a legal right to do, waived the provision of the will. Of

this estate there is no devise over. The devise fails, and the estate descends as intestate estate to the heirs-at-law.

The plaintiff is one of three heirs-at-law who take the estate devised to the widow, and the devise of which fails by her waiver of the provision of the will. The plaintiff would, therefore, be entitled to the possession of one-third of such estate, or of the rents and profits of one-third until the same is sold for the payment of debts; that is to say, she is entitled under the facts agreed to one-third of one-half of the rents received by the administrators, subject to the deductions hereafter stated.

By the agreed statement of facts it appears that the administrators in the collection of the rents and in the management and care of the estates acted as the agents of all the parties in interest. And from the amount to be accounted for as rents are first to be deducted the sums expended for repairs upon the real estate, for interest upon the mortgages, for taxes and insurance, and a reasonable compensation to the administrators for their services in the care of the estates and collection of the rents.

As to the rents received from the houses in Medford Court they must be held to abide the decision in the suit of Montague *v.* Lobdell.

The demand of the widow upon the administrators for dower was of no avail, so far at any rate as it applied to the estates which, by her waiver of the provisions of the will, descended to the heirs-at-law, and no deduction is to be made from the plaintiff's share on that account.

If the parties are unable to agree upon the amount to be paid to the plaintiff, under the rules above stated, the case must be sent to an assessor to fix the amount.

Judgment for the plaintiff.

WILLIAMS, R. P. 443; 3 Washburn, R. P. 6.—578, § 41.

Descent defined: Donahue's Estate, 36 Cal. 329.

The heirs take by operation of law, independent of the intention or will of the intestate: Augustus *v.* Seabolt, 3 Met. (Ky.) 161.

Where the same estate is devised that the devisee would have taken by descent, the title passes by descent and not by purchase: Gilpin *v.* Hollingsworth, 3 Md. 190; Ellis *v.* Page, 7 Cush. 163.

But if one devise land to his wife such as she would have taken by law, she takes by purchase and not by descent: Culbertson *v.* Duly, 7 W. & S. 195.

"Heirs" as applied to the living: Stratford *v.* Sandford, 9 Conn. 274.

B

TITLE BY PURCHASE.

Title acquired by purchase includes every title except that by descent, and is of two kinds: (1) That acquired by act at law, either alone or with some precedent act of one party; (2) that acquired by act of parties.

1

Modes of Acquiring Title by Act of Law, Either Alone or with Some Precedent Act of One Party, are as Follows.

a

Escheat.

If a citizen die intestate and without inheritable blood, or if an alien purchase land and die, the title to such land vests by escheat, *eo instanti*, in the State, without inquest of office.

Sands *v.* Lynham.

Court of Appeals, Virginia, 1876.

27 Gratt. 291.

One Haunstein, an alien, died seised of lands in Richmond, Va. He was unmarried and died intestate. After his death, in 1867, one Gleason procured a judgment against his estate, and the lands were sold to satisfy the same to one Sands, who went into possession thereof. Afterward an inquest of office was had, and it was found that Haunstein died intestate and without heirs, and seised at the time of his death of a fee-simple estate in the lands mentioned. The lands were advertised, according to law, to be sold for the benefit of the State, and Sands filed a bill in equity, praying that the officers be enjoined from selling the same. The injunction was granted by the lower Court, but on the hearing it was dissolved, and hence this appeal.

Staples, J. The inquisition finds that Solomon Haunstein died seised of an estate of inheritance in the lots in contro-

versy; that he died intestate and without heirs, and that there is no person known to the jurors to be entitled to the same; but that said lots have been sold by a decree of the Circuit Court of Henrico County to satisfy an office judgment obtained against the estate of Solomon Haunstein since his death, and that there are now certain parties in possession of said lots claiming under said decree.

It is proper further to state, though it is not part of the inquisition, that the decree referred to was rendered on the 29th April, 1867, in a suit brought, or purporting to have been brought, by William Gleason, assignee of John W. Thompson, against Richard D. Sanxay, curator of the estate of Solomon Haunstein. No copy of the bill or of any exhibit in the record of that suit is filed in this. It does not appear that any order of publication was ever made in the cause, or that there was any party defendant other than Sanxay, the curator. It would seem that the bill and answer were filed on the same day, and on that day the cause was brought on for a hearing by consent, and a decree rendered for a sale of the lots now in controversy.

Upon this state of facts we are to determine what are the rights of the purchasers under that decree. In order to arrive at a satisfactory conclusion upon that point, it becomes necessary to inquire what was the precise status of the real estate of Solomon Haunstein upon his dying intestate and without heirs. Was the title thereto immediately vested in the Commonwealth, or was an inquest necessary to effect that object?

It is well settled that an alien may take lands by grant. But while he has capacity to take, he has none to hold, and the lands may at once be seized to the use of the State. But until they are so seized the alien has complete dominion over them, and his title cannot be divested except upon office found.

And so if lands are devised to an alien, he acquires a complete, though a defeasible title, by virtue of the devise; and this title can only be taken away by an inquest of office, which must be perfected by entry or seizure where the possession is not vacant.

In these cases, and there may be others, it seems that the inquisition is necessary to vest a complete and perfect title in the State.

An alien cannot, however, take by descent, because the law will never cast the freehold upon one who is incapable of holding, and as the freehold can never be kept in abeyance for an instant, in such cases it vests immediately in the State without inquest of office.

For the same reason, if an alien dies intestate, or a citizen dies without heritable blood, his lands belong to the State. They vest immediately, without office found. They sink back into their original condition of common property for the general benefit. The rule on this subject is thus laid down by Chancellor KENT in 4 Vol. Com., page 423: "It is a general principle in the American law, and which, I presume, is everywhere declared and asserted, that when the title to land fails from a defect of heirs, it necessarily reverts to the people, as forming the common stock to which the whole community is entitled. Whenever the owner dies intestate, without leaving any inheritable blood, or if the *relatives* he leaves are aliens, there is a failure of competent heirs, and the land vests immediately in the State by operation of law. No inquest of office is necessary in such case."

In Montgomery *v.* Dorion, 7 New Hamp. R. 475, a well-considered case, the following propositions are laid down:

"If an alien purchase lands and die, the lands instantly vest by escheat in the State, without any inquest of office. But while the alien lives, the lands cannot vest in the State without office found.

"In this State (New Hampshire) the lands of which a citizen dies seised without heirs, revert in all cases to the State; provided he dies intestate. Upon principle, it would seem that lands must in such a case vest immediately in the State without any inquest of office, as they do in England in the crown when the king's tenant dies without heirs.

"There might be cases in which an inquest of office might be expedient, as where one person is found in possession,

claiming as heir or otherwise; but an inquest of office is in no such case essential to vest the title in the State."

In support of these positions numerous other authorities might be quoted; but a simple reference to the cases is all that is necessary: Mooers *v.* White, 6 John. Ch. R. 360; Jackson *v.* Beach, 1 John. Cases, 399; Stevenson and Wife *v.* Dunlap's Heirs, 7 Monr. R. 134; Fry *v.* Tucker, 2 Dana R. 38; Johnson *v.* Hart, 3 John. Cases, 322; Collingwood *v.* Pace, 1 Sid. R. 193; Stokes *v.* Dawes, 4 Mason R. 268; Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch R. 663; O'Hanlin *v.* Den, 1 Spencer's R. 31; White *v.* White, 2 Metc. (Ken.) R. 185; Hinkle's Lessee *v.* Shadden, 2 Swan's R. 46.

The case of Commonwealth *v.* Hite, 6 Leigh, 588, is not in conflict with these authorities. That was an information for intrusion on land of the Commonwealth. Being in the nature of an action of trespass *quare clausum fregit*, it will not be maintained except in the case of actual possession. And the chief, if not the only, question was whether the effect of an inquisition of office was to vest the possession in the State. It was held by this Court that when the possession of escheated lands is vacant at the time of office found the effect of that proceeding is at once to vest the State with possession. If the possession is not vacant, it does not become so vested, and an entry or seizure by the State is essential in order to maintain an information for intrusion. This was the sole point decided by the Court. It is very true that some expressions fell from Judge TUCKER to the effect that the crown can only take by matter of record. All of which is strictly accurate as applied to an alien claiming by *grant or by devise.* He is in by title, having the freehold, which can only be divested by some act in the nature of a judicial proceeding: Because the king may not enter upon or seize any man's possession upon bare surmises, without the intervention of a jury.

But as, according to the common law, lands cannot be in abeyance or without an owner even for a single minute, it follows necessarily that upon the death of the person last seised,

without heirs capable of inheriting, the title must immediately vest in the State without office found.

The doctrine of escheat is originally derived from the old feudal law. An inquisition does not constitute an escheat. It is simply the means by which the State furnishes authentic record evidence of her title. The word escheat is derived from the French, and properly signifies the falling of the lands by accident to the lord of whom they are holden, in which case the fee is said to be *escheated.* It is a species of reversion by which, upon the death of the tenant without heirs, the lord becomes entitled to the estate. While at common law a writ of escheat was necessary to vest the estate in the lord, when the king became entitled, upon the death of a tenant without heirs capable of inheriting, no office was necessary; but he might enter and seize without judicial proceeding, because in such cases the freehold was cast upon him by law in actual possession.

In this country the doctrine of escheat rests upon the broad principle that when the title to land fails from defect of heirs, or when from any cause there ceases to be an individual proprietor of the land, it reverts back to the community: 1 Lomax's Digest 774, 777; 3 Green's Cruise on Real and Per. Property, 213. In such cases, the title being in the State upon the death of the owner, no inquest of office is necessary.

If the possession be vacant at the death of the owner, both title and possession are at once transferred to the State. If, on the contrary, the land be held by adversary possession, the State must enter by her officers. Such an entry may perhaps be necessary to enable the State to make a valid grant of the land, or to maintain an information for intrusion; but it is not essential to the title, any farther than possession is to be considered an element of title.

The State, of course, takes the lands subject to any liens created by the owner, and also to any valid debts contracted by him. But so does the heir, if there is one. This title is none the less complete, because perchance the land may be taken to satisfy the claims of creditors.

In the case before us, upon the death of Solomon Haunstein intestate, without heirs, his real estate became vested *eo instanti* in the State; the possession being vacant, was also transferred along with the title. Whoever entered into the possession did so in subordination to her title. When therefore the jury of inquest found that certain persons were in possession of the lots at the time of the inquisition, which was more than two years after the death of the owner, they found an immaterial fact, which did not affect the title previously acquired by the State.

It seems, however, that the appellant was one of the persons in possession, claiming title to the property under the decree of the Circuit Court of Henrico County. And it is insisted that this decree, having been rendered by a Court of competent jurisdiction, is conclusive of every question decided by it, until reversed by some proper proceeding instituted in the Court which pronounced it.

No one will maintain that the decision of a Court, having jurisdiction of the subject-matter in a case before it, can be collaterally drawn in question for any errors therein, or in the proceedings which led thereto. But it is equally beyond controversy that a decree, however regular in its forms, only binds parties and privies: it cannot affect the title of a person not before the Court. The exceptions to this rule are very few, and have nothing to do with the matter in controversy. It may be that a purchaser at a judicial sale is not affected by errors in the proceedings which led to the decree. He certainly is affected by a want of proper parties before the Court. In this State he takes all the risks of the title. He is bound at his peril to see to it that the persons having title to the property are parties to the suit. Without this, no act of the Court can give him a valid title. The curator of Solomon Haunstein's estate was the only party defendant to the suit in which the decree of sale was rendered. He had nothing to do with the real estate; not the shadow of a title to or interest in it. If the appellant acquired title by his purchase, whose title did he acquire? Certainly not Solomon Haunstein's, as

all his interest terminated with his death; not that of any heirs, as there were none in existence. The title of the State? It is not pretended. Her rights could not be affected by any orders or decrees in a suit to which she was not a party. If authority were needed to sustain so plain a proposition, it may be found in the case of Hudgin *v.* Hudgin's Ex'or *et als.*, 6 Gratt. 320. The decision of this Court in that case is conclusive upon this branch of the present case.

It is very questionable, to say the least, whether the general statutes making real estate assets for the payment of debts, and authorizing suits in equity for the sale and administration of the same, apply to escheated lands. The design of those statutes was to give to creditors a remedy against heirs and devisees in the event of a deficiency of personal estate; and all the provisions have reference to lands which have been devised by will or have descended upon heirs in cases of intestacy.

In cases of escheated lands, the 27th section of chapter 113, Code of 1860, prescribes the mode by which the creditor may enforce his demand against the realty where there is no personalty. It is very true that this section only provides for those cases in which there has been an actual inquest of office. It has been argued that the creditor may be delayed for years, if he is compelled to await an inquisition before instituting proceedings to enforce his demand. It will be seen, however, upon an examination of the various provisions in regard to escheats that but little difficulty is likely to occur in this respect. Each commissioner of the revenue is required annually to furnish a list of lands in his district of which any person shall have died seised of an estate of inheritance, intestate and without any known heir. On receiving such list, or upon information from any person in writing and under oath, the escheator is required at once to hold inquest to determine whether the lands have escheated to the Commonwealth: Code of 1860, chapter 113, §§ 3 and 4. These provisions afford to the creditor the fullest means of enforcing prompt action on the part of the State in the assertion of his claim; while the 27th section gives to him adequate remedies

for the recovery of his demand. Any small delay that may occur by this course bears no sort of comparison to the mischiefs which will result from the establishment of a contrary doctrine. To hold that upon the death of a person without known heirs, any one claiming to be a creditor may file a bill in equity, with a personal representative perhaps in the interest of the plaintiff as the only defendant, and obtain a decree for the sale of the real estate, and thus divest the title of the Commonwealth, is to open the door to the perpetration of the grossest frauds and injustice. The claim may be wholly fictitious. The sale of the lands may be altogether unnecessary. And even if necessary, they may be sold at the most ruinous sacrifice. Who is to protect the interests of the State against abuses and frauds of this description? It is impossible to foresee the mischiefs that will ensue if this Court shall establish a rule of this sort.

This identical question has been the subject of adjudication in other States. In every case I have seen it has been held that upon the death of the owner of lands intestate, without heirs capable of inheriting, the title, *eo instanti* and before office found, vests in the State; and the title could not be divested by a sale made under the decree of any Court, unless the State in some form is a party to the proceeding: Hinkle's Lessee *v.* Shadden, 2 Swan's R. 46; O'Hanlin *v.* Den, 1 Spenc. R. 31–43; 1 Zabriskie R. 582.

If these views be correct, the appellant acquired no title by his purchase valid as against the State. As the title of the latter does not depend upon the inquisition, the alleged errors and irregularities in the proceedings of the escheator are not of the slightest consequence. The rights of the State are not affected by them. The appellant can derive no advantage from them.

The decree of the Circuit Court of the city of Richmond entered on the 17th day of June, 1869, enjoining the sale of the lots in controversy, was therefore manifestly erroneous upon its face. It was erroneous not only for the reasons stated, but for the further reason that it was rendered without

an answer for the escheator. The provisions of the 8th section are positive, that the escheator shall file an answer stating the objection to the claim; and the cause shall be heard without any unnecessary delay, upon the petition, answer, and the evidence. It was the duty of the Court to require such an answer before adjudicating the rights of the State. The decree of the Circuit Court was a decree by default; and the bill of review subsequently filed by the escheator may be treated as a petition for a rehearing. Such an application is required in all cases of decrees by default before an appeal is taken. But even if it be treated as a bill of review, it was a proper case for such a bill for the reasons already stated.

The decree of the 16th of June, 1874, is, however, erroneous in one respect. If the appellant was a purchaser in good faith, he had the right to be substituted to all rights and remedies of the creditor whose debt was paid by the proceeds of sale of the lots in controversy. This was the course pursued by this Court in the case of Hudgin *v.* Hudgin's Ex'or, 6 Gratt. 320, already referred to. This Court having decided in that case that the devisees were not bound by the decree for the sale of their lands in their absence, was of opinion that the purchaser having bought in good faith, and the claim of the creditor being a just one, the former was entitled, upon a disaffirmance of the sale, to be substituted to the rights of the creditor, and to charge the land with the amount of the debt paid by him.

This, of course, involves an inquiry into the validity of the claim asserted by William Gleason, as assignee of John W. Thompson. It may be, as is alleged, that this claim was utterly fraudulent. This record does not furnish any reliable or satisfactory information on that subject. This Court cannot undertake to affirm positively that it is a fictitious claim. If such be its character, neither the State nor the lands of which Haunstein died possessed can be made chargeable with it. It will devolve upon the appellant to show that the debt is a just one; and that must be done by evidence other than the judgment in question. This evidence he may be

able to furnish. At all events, he should have an opportunity of doing so, if desired by him. The decree is therefore affirmed dissolving the injunction, but the same to be retained in the Circuit Court for the inquiry, if desired by the appellant.

The decree was as follows:

The Court is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree of the Circuit Court dissolving the appellant's injunction. It is therefore adjudged, ordered, and decreed that said decree be affirmed, and that the appellant pay to the appellee his costs by him expended in the prosecution of his appeal here.

The Court is further of opinion that the appellant, upon showing that he was a *bona fide* purchaser of the lots in controversy, and the claim asserted by William Gleason, assignee of John W. Thompson, is a valid debt, justly chargeable upon the estate of Solomon Haunstein, deceased, would be justly entitled to be substituted to all the rights and remedies of said Gleason against said estate. The cause is therefore remanded to the said Circuit Court, with instructions to retain the same a reasonable time in that Court, to afford the appellant an opportunity, if desired by him, of establishing the facts upon which his right of substitution depends.

WILLIAMS, R. P. 125; 2 Bl. Comm. 244; Crane *v.* Reeder, 21 Mich. 24–77; Ellis *v.* State, 3 Tex. Civ. App. 170; 21 S. W. Rep. 66; Hanna *v.* State; 84 Tex. 664; Bent *v.* St. Vrain, 30 Mo. 268.

Office Found—Practice Therein: Wallahan *v.* Ingersoll, 117 Ill. 123; Gen. Stats. Minn. 1889, ch. 46, § 64.

"A monster which hath not the shape of mankind," and bastards, as well as aliens, have no inheritable blood: 2 Bl. Comm. 246.

The State only can enforce an escheat.

AMERICAN MORTGAGE CO. *v.* TENNILLE.

Supreme Court of Georgia, 1891.

87 Ga. 28.

LUMPKIN, J. Tennille executed and delivered to J. K. O. Sherwood a promissory note, and at the same time, in order to secure the same, made and delivered to said Sherwood a deed to certain land. Sherwood transferred the note and conveyed the land to the American Mortgage Company of Scotland, Limited, who sued the note to judgment in the Superior Court of Quitman County, and an execution issued thereon was levied upon the land described in the aforesaid deed, the mortgage company having previously filed in the clerk's office a deed purporting to reconvey the land to said Tennille for the purpose of making this levy. To the levy of the execution Tennille filed his affidavit of illegality, containing several grounds, one of which was as follows, viz.: that "the said plaintiff was a foreign corporation, has never been incorporated by the laws of Georgia, and owned more than five thousand acres of land in said State (so far as to claim the same and hold deeds thereto), in conflict with and against the laws of said State, and therefore could not hold the title to lands or convey the same to the defendant legally." The defendant served on the plaintiff a notice to produce at the trial a number of papers, and among them, the charter of the plaintiff and deeds from fourteen persons to Sherwood, and from Sherwood to the plaintiff, covering various lands in Randolph and Quitman Counties; the use intended to be made of said deeds being to prove the ground of illegality above quoted. The Court held that said charter and these deeds should be produced, and upon the plaintiff's failure to do so, ordered the levy of the execution to be dismissed. We can see no error in requiring the production of the charter, as it might contain evidence supporting one of the grounds of the illegality. The main question, therefore, upon which this Court is asked to

pass, in this case, is whether or not the ground of illegality setting forth plaintiff's inability to hold land in excess of five thousand acres is good in law, and consequently whether or not the plaintiff should have been required to produce said deeds.

1. It seems to be well settled that, in a case of this kind, the State alone is authorized to assert her policy in prohibiting foreign corporations from holding five thousand or more acres of land in Georgia, and that individuals have no right to make the question in controversies with each other. Numerous decisions may be found to the effect that, where a corporation acquires or uses land to any extent, or for any purpose, not authorized by its charter, the question of its right so to do cannot be made by an individual in a legal controversy with the corporation, or with those claiming under it, but must be raised directly by a proceeding instituted for that purpose by the State wherein such corporation is exercising such powers *ultra vires*. Some of these decisions were made by the Courts of the State in which the corporations themselves were created, and others in States outside of which the corporations involved had been chartered. None of them are directly in point as to the precise question made in the case now before us, because the disability of the corporations arose under the provisions of their own charters. They are referred to merely to show the trend of judicial opinion on this question. These cases are so numerous and the doctrine they establish is so well recognized, we deem it unnecessary to cite them by name. The following language, used by Judge DILLON in his great work on Municipal Corporations, has some bearing on the question now being considered: "Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the *instance of the State*. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its power is a question

between it and the State, and does not concern the vendor or others:" 2 Dillon on Mun. Corp. (ed. 1890), § 574. We have been able to find some cases directly in point. In that of Barnes *v.* Suddard, 7 N. E. Rep. 477, it was held that, where a foreign corporation had power to acquire real estate so far as necessary for its business, its acquisition of realty cannot be assailed in a collateral proceeding as an act *ultra vires*. It appears from an examination of that case, that in Illinois foreign corporations had the same rights to own and hold real estate as did domestic corporations of that State, and the case turned, not upon the charter powers of the corporation, but upon its right under the Illinois law to hold land. The Pennsylvania Act, approved April 26, 1855, forbade any foreign corporation to acquire and hold real estate. Notwithstanding this statute, it was held, in the case of Hickory Farm Oil Co. *v.* B., N. Y. & P. R. R. Co., 32 Fed. Rep. 22, that a deed of conveyance of land to such a corporation was not void, but passed the title, and that the corporation held the land subject to the Commonwealth's right of escheat; also that the Commonwealth alone could object to the legal capacity of the corporation to hold real estate. In support of this opinion, Bone *v.* Canal Co., 5 Atl. Rep. 751, and R. R. Co. *v.* Lewis, 4 N. W. Rep. 842, are cited. Another case holding the same way is that of Carlow *v.* Aultman & Co., decided by the Supreme Court of Nebraska, and reported in 44 N. W. Rep. 873. An Act of Nebraska passed in 1887, provided that no non-resident alien foreigner, nor any corporation not incorporated by the laws of that State, should acquire or own, hold or possess any real estate in the State of Nebraska. While this law was in force, Aultman & Co., a foreign corporation, purchased land in that State at a judicial sale, and it was held that this corporation's title was valid against every one but the State, and could be divested only by proceedings brought by the State for that purpose. These foreign corporations, it seems, have been treated as aliens were in England as to purchasing and holding real estate. By the common law, while an alien might purchase, he could do so only for the benefit of the king, and the king

was entitled to land purchased by him by virtue of his prerogative upon "office found," and accordingly it was held that, unless the proceeding of "office found" was perfected, an alien had the power to hold and convey the land *inter vivos:* 1 Devlin on Deeds, §§ 124, 125. It therefore seems clear, in view of the cases cited and the common-law foundation upon which the principle governing them is based, that the doctrine is thoroughly established in our American States, that the right of foreign corporations to purchase or hold lands in excess of the authority conferred either by their own charters or by the laws of the State in which such purchase is made, can only be questioned by the State itself in which such land may be situated. It follows, of course, that the defendant in this case had no right whatever to raise the question made in the ground of this illegality hereinbefore set forth. And that being true, the production of the deeds called for was unnecessary and useless, because the ground of illegality in support of which it was sought to introduce these deeds presented no legal reason for interfering with the progress of the plaintiff's execution.

2. Another ground of the illegality alleged in effect that the deed purporting to be from the plaintiff to the defendant in execution, which had been filed in the clerk's office, was no sufficient deed, and would not convey title out of the plaintiff to the defendant, but would only throw a cloud upon the defendant's title and cause the land to sell for less than its true value. If these assertions are true, they amount to a good ground of illegality. It may be that such ground is not set forth with sufficient clearness, but as there was no special demurrer or objection to it because it was wanting in distinctness or fullness, but only a general motion, in the nature of a demurrer, to dismiss the affidavit of illegality, the point was not rightly made to the Court below as to the insufficiency of this ground, and the Judge therefore properly refused to dismiss the affidavit of illegality as a whole. If this ground failed to set forth the reasons why the deed referred to was insufficient and failed to convey title to the defendant, this distinct ob-

jection should have been made to it. We therefore leave the case to be tried again in the Court below, with such additional light shed upon the law of the case as may be gathered from this opinion.

Judgment reversed.

See above case in 12 L. R. A. 529, full note.

Escheat was to the lord of whom the lands were held. *Forfeiture* in case of high treason was to the crown. But in case of an escheat, if there were no lord of the fee, the interest would go to the crown: WILLIAMS, R. P. 126.

Occupancy.—Title by occupancy as technically known is now obsolete: Gen. Stats. (Minn.) 1878, ch. 45, § 6; Gen. Laws (Minn.) 1889, p. 105, § 62.

b

Title by prescription or adverse possession.

At common law title to incorporeal hereditaments only could be acquired by prescription, but by virtue of the statute of limitations the title to land may now be acquired in a similar manner, usually called adverse possession.

As against a stranger mere possession of land is title.

SHERIN *v.* BRACKETT.

Supreme Court of Minnesota, 1886.

36 Minn. 152.

BERRY, J. This is an action in the nature of ejectment, in which the plaintiffs, seeking to recover possession of a strip of land, alleged that on October 1, 1885, and long before, they were and now are owners thereof; and further that they and their ancestors, from whom they derive title, have been in the actual, peaceable, open, notorious, adverse, and continuous possession thereof for more than twenty-five years prior and up to October 8, 1885; that on that day, while they were in such actual possession, defendant unlawfully entered upon said strip of land and wrongfully ejected them therefrom, and ever since wrongfully detains possession thereof.

Doubtless the intent of the pleader was to set up title in fee based upon what is called adverse possession. But as the

greater includes the less, the complaint sufficiently pleaded actual possession at the time of the defendant's alleged entry, so that if upon the trial the plaintiffs failed to make out adverse possession, such as would give them title as against the holder of the paper title, still, if they proved actual possession, they might properly insist that they were within the allegations of their complaint, and had made out a case as against a mere trespasser. For as against one showing no title in himself, possession is title: Wilder *v.* City of St. Paul, 12 Minn. 116 (192); Rau *v.* Minnesota Valley R. R. Co., 13 Minn. 407 (442); Sedg. & W. Tr. Title Land, §§ 717, 718.

The evidence upon the trial below in the case at bar showed that plaintiffs were in possession of the strip of land in controversy at the time of defendant's entry upon it, and defendant gave no evidence of any right or title in himself. In this state of the evidence the plaintiffs were entitled to judgment, and hence the trial Court erred in dismissing the action at the close of the plaintiffs' testimony. As this point is insisted upon by the plaintiffs it cannot be disregarded, and so there must be a new trial.

This disposes of the present appeal, but (as we surmise) not of the real merits of the controversy, and therefore, with reference to a new trial, we deem it expedient to determine certain other questions raised upon the argument.

And, *first*, though there are a few cases which hold that the statutory period of adverse possession, which will bar an action for the recovery of land, may be made up by tacking together the periods of the adverse possession of several successive holders between whom there is no privity (see Scales *v.* Cockrill, 3 Head, 432; Smith *v.* Chapin, 31 Conn. 530; Davis *v.* McArthur, 78 N. C. 357), the rule laid down by the great majority of Courts and by the text-writers, and supported by the weight of authority, and which must be regarded as the true rule, is that privity between successive adverse holders is indispensable. And this upon the principle that unless the successive adverse possessions are connected by privity, the disseisin of the real owner resulting from the adverse possession

is interrupted, and during the interruption, though but for a moment, the title of the real owner draws to it the seisin or possession: Melvin *v.* Proprietors, etc., 5 Metc. 15 (38 Am. Dec. 384); Haynes *v.* Boardman, 119 Mass. 414; McEntire *v.* Brown, 28 Ind. 347; Jackson *v.* Leonard, 9 Cow. 653; Wood, Lim., § 271; San Francisco *v.* Fulde, 37 Cal. 349; Crispen *v.* Hannavan, 50 Mo. 536; Shuffleton *v.* Nelson, 2 Sawy. 540; Ang. Lim., §§ 413, 414; Sedg. & W. Tr. Title Land, §§ 740, 745–747; Riggs *v.* Fuller, 54 Ala. 141.

Second. The privity spoken of exists between two successive holders when the later takes *under* the earlier, as by descent (for instance, a widow under her husband, or a child under its parent), or by will or grant, or by a voluntary transfer of possession: Leonard *v.* Leonard, 7 Allen, 227; Hamilton *v.* Wright, 30 Iowa, 480; Jackson *v.* Moore, 13 John. 513 (7 Am. Dec. 398); McEntire *v.* Brown, *supra;* Weber *v.* Anderson, 73 Ill. 439; Wood, Lim., § 271; Sedg. & W. Tr. Title Land, §§ 747, 748.

Third. While to operate as a bar, adverse possession must be continuous, continuity will not be interrupted by the possession, during any part of its period, of one who occupies the premises as a tenant of the alleged adverse possessor. In such cases the tenant's possession is that of his landlord: San Francisco *v.* Fulde, *supra;* Rayner *v.* Lee, 20 Mich. 384; Sedg. & W. Tr. Title Land, § 747.

Fourth. Possession, to be adverse, so as to bar an owner's right of action, must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely: Sedg. & W. Tr. Title Land, § 731 *et seq.*

This is all which we deem it necessary to say in this case; for, as there is to be a new trial, we forbear to comment upon the evidence.

Order reversed, and new trial awarded.

But to acquire title to land as against the real owner, there must be an entry thereon by the claimant, with intent to claim title thereto, followed by an actual, open, continuous, exclusive, and hostile possession during the statutory period of limitation.

Actual Entry with Hostile Intent.

EWING *v.* BURNET.

Supreme Court of the United States, 1837.

11 Pet. 41.

Mr. Justice BALDWIN. In the Court below, this was an action brought in November, 1824, by the lessor of the plaintiff, to recover possession of lot No. 209, in the city of Cincinnati, the legal title to which is admitted to have been in John Cleves Symmes, under whom both parties claimed: the plaintiff, by a deed dated 11th of June, 1798, to Samuel Foreman, who, on the next day, conveyed to Samuel Williams, whose right, after his death, became vested in the plaintiff: the defendant claimed by a deed to himself, dated 21st of May, 1803, and an adverse possession of twenty-one years before the bringing of the suit. It was in evidence that the lot in controversy is situated on the corner of Third and Vine Streets; fronting on the former one hundred and ninety-eight, on the latter ninety-eight feet; the part on Third Street is level for a short distance, but descends toward the south along a steep bank, from forty to fifty feet, to its south line; the side of it was washed in gullies, over and around which the people of the place passed and repassed at pleasure. The bed of the lot was principally sand and gravel, with but little loam or soil; the lot was not fenced, nor had any building or improvement been erected or made upon it, until within a few years before suit brought; a fence could have been kept up on the level ground on top of the hill on Third Street, but not on its declivity, on account of the deep gullies washed in the bank; and its principal use and value was in the convenience of digging sand and gravel for the inhabitants. Third Street separated this lot from the one on which the defendant resided from 1804, for many years, his

mansion fronting on the street; he paid the taxes on this lot from 1810 until 1834, inclusive; and from the date of the deed from Symmes, until the trial, claimed it as his own. During this time, he also claimed the exclusive right of digging and removing sand and gravel from the lot; giving permission to some, refusing it to others; he brought actions of trespass against those who had done it, and at different times made leases to different persons, for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so; on the contrary, several witnesses testified to his continued assertion of right to the lot; their knowledge of his exclusive claim, and their ignorance of any adverse claim for more than twenty-one years before the present suit was brought. They further stated, as their conclusion from these facts, that the defendant had, from 1806, or 7, in the words of one witness, "had possession of the lot;" of another, that since 1804, "he was as perfectly and exclusively in possession, as any person could possibly be of a lot not built on or inclosed;" and of a third, "that since 1811, he had always been in the most rigid possession of the lot in dispute; a similar possession to other possessions on the hill lot." It was further in evidence that Samuel Williams, under whom the plaintiff claimed, lived in Cincinnati, from 1803, till his death in 1824; was informed of defendant having obtained a deed from Symmes, in 1803, soon after it was obtained, and knew of his claim to the lot; but there was no evidence that he ever made an entry upon it, demanded possession, or exercised or assumed any exercise of ownership over it; though he declared to one witness, produced by plaintiff, that the lot was his, and he intended to claim and prove it when he was able. This declaration was repeated often; from 1803, till the time of his death, and on his death-bed; and it appeared that he was, during all this time, very poor; it also appeared in evidence, by the plaintiff's

witness, that the defendant was informed that Williams owned the lot before the deed from Symmes, in 1803, and after he had made the purchase.

This is the substance of the evidence given at the trial, and returned with the record and a bill of exceptions, stating that it contains all the evidence offered in the cause: whereupon the plaintiff's counsel moved the Court to instruct the jury that on this evidence the plaintiff was entitled to a verdict; also that the evidence offered by the plaintiff and defendant was not sufficient, in law, to establish an adverse possession by the defendant: which motions the Court overruled. This forms the first ground of exception by the plaintiff to the overruling his motions: 1. The refusal of the Court to instruct the jury that he was entitled to recover: 2. That the defendant had made out an adverse possession.

Before the Court could have granted the first motion, they must have been satisfied that there was nothing in evidence, or any fact which the jury could lawfully infer therefrom, which could in any way prevent the plaintiff's recovery; if there was any evidence which conduced to prove any fact that could produce such effect, the Court must assume such fact to have been proved; for it is the exclusive province of the jury to decide what facts are proved by competent evidence. It was also their province to judge of the credibility of the witnesses, and the weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the Court could not interfere, the plaintiff's right to the instructions asked must depend upon the opinion of the Court, on a finding by the jury in favor of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff.

Now as the jury might have refused credence to the only witness who testified to the notice given to the defendant of Williams' ownership of the lot in 1803, and of his subsequent assertion of claim, and his intention to improve it; the testimony of this witness must be thrown out of the case, in testing the

correctness of the Court in overruling this motion; otherwise we should hold the Court below to have erred, in not instructing the jury on a matter exclusively for their consideration; the credibility of a witness, or how far his evidence tended to prove a fact, if they deemed him credible. This view of the case, throws the plaintiff back to his deed, as the only evidence of title, on the legal effect of which, the Court were bound to instruct the jury as a matter of law, which is the only question to be considered on this exception.

It is clear that the plaintiff had the elder legal title to the lot in dispute, and that it gave him a right of possession, as well as the legal seisin and possession thereof, co-extensively with his right; which continued till he was ousted by an actual adverse possession: 6 Pet. 743; or his right of possession had been in some other way barred. It cannot be doubted that from the evidence adduced by the defendant, it was competent for the jury to infer these facts; that he had claimed this lot under color and claim of title, from 1804, till 1834; had exercised acts of ownership on, and over it, during this whole period; that his claim was known to Williams and to the plaintiff; was visible; of public notoriety for twenty years previous to the death of Williams. And if the jury did not credit the plaintiff's witness, they might also find that the defendant had no actual notice of Williams' claim; that it was unknown to the inhabitants of the place, while that of the defendants was known; and that Williams never did claim the lot, or assert a right to it from 1803, till his death in 1824. The jury might also draw the same conclusion from these facts, as the witnesses did; that the defendant was during the whole time in possession of the lot, as strictly, perfectly, and exclusively, as any person could be of a lot not inclosed or built upon; or as the situation of the lot would admit of. The plaintiff must therefore rely on a deed of which he had given no notice, and in opposition to all the evidence of the defendant, and every fact which a jury could find, that would show a right of possession in him, either by the presumption of a release or conveyance of the elder legal title, or by an adverse

possession. On the evidence in the cause the jury might have presumed a release, a conveyance, or abandonment of the claim or right of Williams, under a deed in virtue of which he had made no assertion of right from 1798, in favor of a possession, such as the defendant held from 1804; though it may not have been strictly such an adverse possession, as would have been a legal bar under the act of limitations. There may be circumstances which would justify such a presumption in less than twenty-one years: 6 Pet. 513; and we think that the evidence in this case was in law sufficient to authorize the jury to have made the presumption to protect a possession of the nature testified for thirty years; and if the jury could so presume, there is no error in overruling the first motion of the plaintiff.

On the next motion, the only question presented is on the legal sufficiency of the evidence to make out an ouster of the legal seisin and possession of Williams by the defendant, and a continued adverse possession for twenty-one years before suit brought.

An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster; otherwise it is a mere trespass, in legal language the intention guides the entry, and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot, as early as 1804, cannot be doubted; nor that he claimed the exclusive right to it under color of title, from that time until suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself; so that the only inquiry is as to the nature of the possession kept up. It is well settled that to constitute an adverse possession, there need not be a fence, building, or other improvement made: 10 Pet. 442; it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy, for twenty-one years, after an

entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued for twenty-one years, with the knowledge of an adverse claimant without interruption, or an adverse entry by him, for twenty-one years, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him; if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation, or residence are necessary to constitute actual possession: 6 Pet. 513; when the property is so situated as not to admit of any permanent useful improvement; and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. Whether this was the situation of the lot in question, or such was the nature of the acts done, was the peculiar province of the jury; the evidence in our opinion was legally sufficient to draw the inference that such were the facts of the case; and if found specially, would have entitled the defendant to the judgment of the Court in his favor; they, of course, did not err in refusing to instruct the jury that the evidence was not sufficient to make out an adverse possession.

The remaining exceptions are to the charge of the Court, in which we can perceive no departure from established principles. The learned Judge was very explicit in stating the requisites of an adverse possession; the plaintiff had no cause of complaint of a charge, stating that exclusive appropriation by an actual occupancy, notice to the public, and all concerned of the claim, and enjoyment of profits by defendant, were all necessary. No adjudication of this Court has established stricter rules than these; and if any doubts could arise, as to

their entire correctness, it would be on an exception by the defendant. In applying them in the subsequent part of the charge to the evidence, there seems to have been no relaxation of these rules. The case put by the Court, as one of adverse possession, is of a valuable sand bank exclusively possessed, and used by the defendant, for his own benefit, by using and selling the sand; and this occupancy, notorious to the public and all concerned, which fully meets all the requisites before stated, to constitute adverse possession. If we take the residue of the charge literally, it would seem to add other requisites; as the payment of taxes, ejecting and prosecuting trespassers on the lot; its contiguity to the defendant's residence, etc.; but such is not the fair construction of the charge, or the apparent meaning of the Court. These circumstances would seem to have been alluded to, to show the intention with which the acts previously referred to were done; in which view they were important, especially, the uninterrupted payment of taxes on the lot for twenty-four successive years; which is a powerful evidence of claim of right to the whole lot. The plaintiff's counsel has considered these circumstances as making a distinct case in the opinion of the Court, for the operation of the statute; and has referred to the punctuation of the sentence, in support of this view of the charge. Its obvious meaning is, however, to state these as matters additional or cumulative to the preceding facts; not as another distinct case made out by the evidence, on which alone the jury could find an adverse possession. Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.

It has been urged, in argument, that as the defendant had notice of the claim of Williams, his possession was not fair and honest, and so not protected by the statute. This admits of two answers: 1. The jury was authorized to negative any notice; 2. Though there was such notice of a prior deed, as

would make a subsequent one inoperative to pass any title, yet an adverse possession for twenty-one years, under claim and color of title, merely void, is a bar; the statuory protection being necessary only where the defendant has no other title but possession, during the period prescribed.

The judgment of the Circuit Court is therefore affirmed.

Ellicott *v.* Pearl, 10 Pet. 441; Kerr *v.* Hitt, 75 Ill. 51; Clark *v.* Potter, 32 Ohio St. 49; Fleming *v.* Maddox, 30 Iowa, 241; Churchill *v.* Onderdonk, 59 N. Y. 136; Dean *v.* Goddard, 56 N. W. Rep. 1060.

Actual Possession.

FLEMING *v.* MADDOX.

Supreme Court of Iowa, 1870.

30 Iowa, 239.

MILLER, J. The only error assigned is the ruling of the Circuit Court, sustaining appellee's motion to set aside the sheriff's sale and deed. The facts disclosed by the record are:

1. The appellees, Thomas A. Maddox and his wife, at the time of the issuance of the execution, levy, and sale resided in Polk County.

2. The land levied on and sold is situated in Boone County.

3. Thomas A. Maddox was the owner of the land levied on, upon which he had erected a saw-mill which he had been operating up to within four or five weeks of the levy, manufacturing the timber on the premises into lumber; at the time of the levy, however, the mill, for some temporary reason, was not running. There were a number of lumbermen and choppers, employees of defendant, residing and working on the land at the time of the levy, one of whom had the general management of defendant's business connected with the mill, etc.

4. Neither the defendant, nor his wife, nor his foreman on the premises were served with written notice of the levy and sale of the land, as contemplated by section 3318 of the

Revision in cases where a defendant in execution is in the actual occupation and possession of the land levied on.

5. The execution was a special one issued upon a judgment and decree of foreclosure of a mortgage against the land levied and sold.

Upon these facts the Court below held that the defendant, Thomas A. Maddox, was entitled to the notice prescribed in the section of the Revision above named. Was there error in this ruling? The provisions of the section referred to are: "If the defendant is in the *actual occupation and possession* of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve the defendant with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale; *and sales made without the notice* required in this section *may be set aside on motion* made at the same or the next term thereafter."

There are two kinds of possession of real property known to the law—*actual* and *constructive*. It is actual when in the immediate occupancy of the party. It is actual where the owner goes upon the land to take possession, and exercises acts of ownership over it. It is actual also where one having the title is in possession of lands by his tenant, agent, or steward: 2 Bouv. Law Dic. 352, title "Possession;" Langworthy *v.* Myers *et al.*, 4 Iowa, 21, 39, 40; Wall *v.* Nelson, 3 Litt. 398; Humphrey *v.* Jones, 3 Mon. 261; Bell *v.* Longworth, 6 Ind. 274; Speed *v.* Buford, 3 Bibb. 75.

Constructive possession is where one claims to hold by virtue of some title, without having the actual occupancy, as when the owner of a tract of land, regularly laid out, is in possession of a part, he is constructively in possession of the whole: 2 Bouv. Law. Dic. 352, title "Possession." Under our statute, "all persons *owning* lands not held by an adverse possession shall be deemed to be seised and possessed of the same:" Rev., § 2207.

Of what kind, then, was the possession of the appellee, actual or constructive? His ownership is conceded. He had

actually entered upon the land, erected a saw-mill thereon, was carrying on the business of manufacturing the timber thereon into lumber and fire-wood, some of his employees residing on the land, and he was exercising *acts* of ownership generally over the premises.

Previous to his actual entry for these purposes, being the owner, he had constructive possession only, but after such entry, etc., his possession became actual. It became such because of his entry for the purpose of taking actual possession, and because he continued to exercise acts of ownership thereon, and employing and keeping persons residing upon the premises actually engaged in the business which he was there prosecuting. True, he did not himself reside thereon or make that his home, but a man may have actual possession of real property without residing upon it. He may have such possession, although there be no house thereon in which to reside: Langworthy *v.* Myers, 4 Iowa, 21; Roberts *v.* Long, 12 B. Mon. 195; Campbell *v.* Thomas, Ib. 83; Humphrey *v.* Jones, *supra.*

In the case of Langworthy *v.* Myers, *supra*, the plaintiff did not reside upon the premises, nor on land contiguous thereto, and this Court held that his entry and taking possession, and exercising acts of ownership from time to time, constituted "*actual possession.*"

In order, however, to entitle the appellee to written notice of the levy and sale as contemplated by the statute, he must have been in the "actual occupation" as well as "actual possession" of the premises: Rev. of 1860, § 3318.

By the term "occupation" is meant *use or tenure,* as a house in the occupation of A.: 2 Bouv. Law Dic. 254.

An occupier is one who is in the use or enjoyment of a thing: Ib.

A mechanic is in the occupation of his shop where he carries on his business; a merchant of his store; a lawyer of his office; a farmer of his farm. It is not necessary to make his occupation complete that the mechanic should reside in his shop or upon the same lot. He is in the occupation

because he uses and enjoys it in carrying on his legitimate calling. So with the merchant, the lawyer, the farmer.

If the farmer leases his farm to a tenant, he would still have the possession, because the possession of the tenant is that of his landlord, but he would not be in the actual occupation; he has parted with that to his tenant. The tenant, after entry under the lease, has the use and enjoyment of the premises, and pays to his landlord the stipulated rent therefor. But, where the owner of land is in the actual use and enjoyment of it himself, although in such use and enjoyment he employs others to perform all the labor connected therewith, he is in its actual occupation, within the meaning of that term.

In the case before us the appellee owned the land; he used and enjoyed it in a legitimate way for his own benefit; he was prosecuting a regular business thereon; he was in its "actual occupation and possession."

It is insisted, however, on the part of appellant, that notwithstanding defendant was in "actual occupation and possession," yet this sale, having been made under a *special execution* in conformity to a decree of foreclosure of a mortgage, the sale was in obedience to the order of the Court; the officer and defendant had nothing left but obedience thereto, and that the defendant could not have been benefited by the notice in question.

This precise question was made and decided in the case of Jenssn *v.* Woodbury, 16 Iowa, 516. It was there held that the provisions of section 3318 of the Revision were applicable to all sales on execution, including sales on special executions, in the foreclosure of mortgages.

With that decision, and the reasons given in support of it, we are satisfied.

The judgment of the Circuit Court is affirmed.

Open.

It must be open, visible or notorious possession, such that the real owner may be presumed to know that there is a possession of the land adverse to his title, otherwise one might be disseised without his knowledge.

WHITAKER *v.* ERIE SHOOTING CLUB.
Supreme Court of Michigan, 1894.
60 N. W. Rep. 983.

GRANT, J. The complainant, Maria, is the widow, and the other complainants are the heirs-at-law of Harvey Whitaker, deceased, who died in June, 1890. Harvey Whitaker purchased the land in question in 1837. The object of the bill is to remove a cloud from their title, caused by a tax deed made by the State of Michigan January 16, 1860, to Elias W. Hodges and Andrew J. Keeney for the taxes of 1857, and a lease executed by Andrew J. Keeney to the Erie Shooting Club August 28, 1889. The defendant, Keeney, answered, claiming title by adverse possession, and asking affirmative relief, affirming his title. The Shooting Club answered, admitting the execution of the lease and of its corporation, and leaves complainants to their proofs on their other allegations.

The situation and character of the land: The land is a piece of marsh situated in the southeast corner of Monroe County, about 120 rods from the mainland, on the west, and a mile from the sea-wall of the shore of Lake Erie on the east. Between it and the mainland is mud, which is at times covered with water. Upon it is a large sulphur spring. Around the spring the land is a little higher, and on a few acres grows hay fit for use. At low water the land around this spring is from a foot and a half to two feet above the water. When the wind blows from Lake Erie the land is entirely submerged. The only way to reclaim it, so as to render it fit for cultivation, would be the erection of a dike around it several feet high. The only use to which it can ever be put, aside from the cutting of the hay around the spring, is for

hunting birds, muskrats, and mink, but its principal use is for hunting birds.

Abandonment by complainant's ancestor: From 1837 to 1892 neither the complainants nor their ancestor exercised any act of possession. For ten years prior to his death Harvey Whitaker lived in Detroit, forty miles distant. Maria S. Whitaker testified on behalf of the complainants as follows: "Q. Do you know what became of his property? A. Well, it was overflowed. We had nothing to do with it. Q. What did you do with this spring lot? A. I don't know as anything. We all supposed it went. We considered it all lost. We thought it wasn't worth anything. Q. And you abandoned it? A. Yes. Q. You never paid any taxes on it. A. No, sir, I think not. I never knew any being paid. Q. When did you first know your husband left this property? A. I knew he bought it at the time, but, as I say, we had given it up. It was overflowed, and we supposed it was worth nothing. I don't suppose he knew it was worth anything." Prior to 1860 the land was sold for taxes, to various parties, who took no steps to obtain possession.

Defendants' connection with the land: Mr. Hodges and Andrew J. Keeney knew that Mr. Whitaker had abandoned the land at the time of the purchase of the tax title. Their tax deed was placed upon record January 30, 1860. From that time to the present the taxes were assessed to and paid by them. Hodges and Keeney leased the right to trap upon the premises to various parties every year, some years receiving four or five dollars; some, twelve or fifteen; and other years receiving nothing. They also caused some willows to be planted near the spring and occasionally cut hay. No other acts of actual possession are shown, except that they occasionally went to the land to look after it, as owners of land usually do. From 1860 to the commencement of this suit, it was understood by all living in the neighborhood that this was the property of Hodges and Keeney. On May 8, 1879, Andrew J. Keeney executed to the Bay Point Shooting Club a lease of the undivided half interest of the land, which interest is now

the sole subject of controversy here, for the purpose of hunting and shooting snipe, wild fowls, and all other birds recognized as game by the laws of the State, and for all other purposes necessary and incident thereto, and for no other use or purpose. This lease was recorded November 15, 1880. This club immediately caused signs to be painted, and posted at various places around this land the following notice: "Lands of the Bay Point Shooting Club. All Trespassers will be Prosecuted. [Signed] A. J. Keeney, President." At the termination of that lease, and on August 28, 1889, Mr. Keeney executed a similar lease to the Erie Shooting Club, which was recorded March 22, 1890. During the occupancy by these clubs these signs were placed in position every spring and taken up every fall, because the ice would carry them away. Watchmen were also employed to keep off trespassers during the shooting season. These acts of possession continued from 1880 to the commencement of this suit in 1893.

The requirements of an adverse possession necessary to establish title to real estate are well understood. The difficulty arises in applying these requirements in each case as it arises. Each case, as a rule, must be controlled by its own facts and circumstances. The established rule of this Court is: "It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in the question:" Murray *v.* Hudson, 65 Mich. 670, 32 N. W. 889. The occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient. After long and intentional abandonment by the owner in this case, those under whom the defendants claim obtained a tax deed from the State of Michigan. They immediately placed this on record. This, of itself, was a sufficient disseisin to support an action of ejectment by the original owner: Hoyt *v.* Southard, 58 Mich. 434, 25 N. W. 385. The defendant at once commenced to exercise such acts of possession and ownership

as were consistent with the character of the land. Evidence of the general understanding in the neighborhood that they were the owners, and that it was called theirs, was held competent, as tending to establish the notoriety of defendant's possession and claim of title: Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93. *Pedis possessio* is not indispensable. The land need not be fenced. Buildings are not necessary. Where the possession claimed was by cutting grass and pasturing cattle each year during the season and planting trees, it was held to be evidence of a practically continuous, exclusive, and hostile possession: Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265. Openly and notoriously claiming and using land in the only way it could be used without fencing or cultivation was held to establish adverse possession: Curtis *v.* Campbell, 54 Mich. 340, 20 N. W. 69. Cropping land, though no one was actually upon it, and nothing done thereon between harvest and recropping, were held to establish adverse possession: Cook *v.* Clinton, 64 Mich. 309, 31 N. W. 317. It may well be conceded that paying taxes, or assertion of title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, is not sufficient to establish title by adverse possession. But they are all competent evidence to be considered in determining the question. The notices which were posted around this land from early in the spring till late in the fall, every year for twelve successive years, was notice of an adverse title and possession. The owner, if he visited it, could not have failed to understand their meaning. They were inconsistent with the rights of the original owner of the fee. The land was then valuable for little else than shooting. Mr. Whitaker lived within forty miles of this land for ten years, with these open, notorious assertions of title and possession posted around the land from early in the spring till late in the fall. This substantially covered all the time during which this land could be used for any purpose except for hunting muskrats. The notice denied all right to use unless authorized by the club. We need not discuss the question of possession prior to the lease of the Bay Point Shooting

Club. Ten years of adverse possession under the tax deed is sufficient. The decree will be affirmed.

Costello *v.* Edson, 44 Minn. 135; Vandall *v.* St. Martin, 42 Minn. 163; Wood *v.* Springer, 45 Minn. 299; Watrous *v.* Morrison, 33 Fla. 261; 14 S. Rep. 805; Foulke *v.* Bond, 41 N. J. L. 545; Cornelius *v.* Giberson, 25 N. J. L. 33; Cobb *v.* Davenport, 32 N. J. L. 385.

If the hostile entry is with the knowledge of the owner, notorious possession is not necessary: Key *v.* Jennings, 66 Mo. 367; Cook *v.* Babcock, 11 Cush. 206; School District *v.* Lynch, 33 Conn. 330; Murphy *v.* Doyle, 37 Minn. 113; Scott *v.* Woodruff, 4 S. W. Rep. 908.

Continuous.

BOWEN *v.* GUILD.

Supreme Judicial Court of Massachusetts, 1880.

130 Mass. 121.

The plaintiff had owned certain lands, which defendant had possessed adversely for more than the statutory period of limitation, except that within that period the plaintiff had once entered and passed over the land to ascertain its condition, which entrance he claimed was an interruption of defendant's possession, and thereafter he brought an action of tort against the defendant for entering the close and erecting a fence thereon.

LORD, J. We have deemed it necessary in this case to consider but one of the various questions raised by the defendant. Mr. Ellis Ames, a counsellor of this Court, testified "that in August, about the year 1870, he went upon the land with Mr. Bowen, one of the plaintiffs; that they went all over the land and saw no fence, either upon the road or any other side of the land; that the land was rough and uncultivated; that bushes were growing upon a part of it; that he saw no indication that the land had been cultivated that year; that he saw no one else on the land; and that they went upon the land for the purpose of discovering, if they could, any evidence of adverse occupation upon which he could bring a writ of entry against Charles L. Guild." The presiding Judge ruled that, if the facts thus testified to were true, they constituted, as matter of law, necessarily, an interruption of an adverse pos-

session of the defendant, commencing at the time of the institution of the former suit, in August, 1857, and continuing, with such exception, to the commencement of the present action, in October, 1878, a period of more than twenty years.

This ruling seems to have been based upon a misapprehension of the decision in Brickett *v.* Spofford, 14 Gray, 514. In that case, it appears that the owner of the land went upon it in company with one who proposed to purchase it, for the purpose of ascertaining, in view of the proposed purchase and sale, the value of the land, the quantity and quality of the wood upon it, and such elements as were necessary to determine its value; and that after such entry the owner of the land gave a deed of it to the person who was at the time of their going upon the land negotiating for its purchase. The Court did not hold, as matter of law, that such entry upon the land was conclusive upon the question of adverse possession by the defendont; but held that it was evidence to be submitted to the jury, with all the other evidence in the case, in determining whether the party did make such a re-entry as to enable him to convey his estate by deed; the only question in that case being whether the plaintiff's grantor was so disseised at the time of the conveyance as that he could not effectually convey his title except by re-entry and delivery of the deed upon the land. The defendant had been in possession only two years, and his title was obtained through a levy upon the estate which had been previously made, and which was unrecorded, and therefore void as against the plaintiff, taking a deed under the judgment debtor's title without notice. If, in that case, the entry as thus made had not been followed by the assertion of title which the conveyance by warranty deed implies, and had been followed by no other act of possession during the subsequent eighteen years during which the defendant had continued to hold it, and the Court had decided that the adverse possession could not commence until after such possession, because such an entry was an interruption to the adverse possession, that decision would have been authority for the ruling. But the question there presented was an entirely

different one. It had no relation to the question of the acquisition of title by adverse possession, but only to the question whether the true owner was so disseised at the time of his grant that his deed passed no title; and in that case the decision of the Court went only to the point that the evidence was proper to be submitted to the jury upon the question whether he had in fact so repossessed himself, under an entry claiming the highest right of ownership, that of selling the land, and actually selling it, after negotiations upon it, as to make his deed effectual.

The entry in this case was followed by no act of ownership, and was simply a passing over the land for the purpose of ascertaining its condition, to see whether any use had been made of it, or whether any buildings or structures had been erected upon it, and to see whether there was any evidence of a disseisin. It did not appear that such passing over the land was in presence of the defendant, or that he ever in any mode had any knowledge of it. The circumstances under which it was made, and the time of day or night, do not appear, except as it may be inferred from the known character of the gentleman under whose direction it appears to have been done. It is consistent with the actual use by the defendant of the land upon every other day of the twenty years. It was a question for the jury whether in fact it was an interruption of the defendant's possession. That fact must be determined by them upon all the evidence in the case; and it was error in the presiding Judge to rule, as matter of law, that it was necessarily such a re-entry and reclamation of possession as to be an interruption in fact of the defendant's possession.

What is an adverse and exclusive possession, and what is an interruption of such possession, depend very much upon the character of the land, and the purposes to which it is adapted and for which it is used. The adverse possession of an outlying lot of small value, remote from the dwellings of people, suitable for pasturing or for the growth of wood, or for some other purpose of husbandry, is to be proved by evidence very different from that which establishes

the exclusive occupation of a residence or a shop or storehouse within the limits of a thickly settled business population. The rule of law is the same in both cases; but the evidence necessary to prove the fact is very different. In either case the question is: Has the adverse possession, considering the nature, situation, and uses of the land, been exclusive and continuous? The presiding Judge having ruled that this single fact, though proper to be considered, was in itself, as matter of law, an interruption of the possession, it was error.

Although there may be cases in which the occupation by the true owner may be of such a nature, and so continued, that it would be the duty of the Court, upon the truth of such facts being apparent, to rule, as matter of law, that the adverse possession had been interrupted, still the general principle is that it is a question for the jury to determine whether in fact the adverse possession has been continuous or has been interrupted: Stevens *v.* Taft, 11 Gray, 33, 35; O'Hara *v.* Richardson, 46 Pa. St. 385. See, also, Peaceable *v.* Read, 1 East, 568; Jackson *v.* Wood, 12 Johns. 242; Van Gorden *v.* Jackson, 5 Johns. 440, 467; Mayor of Hull *v.* Horner, Cowp. 102; Fishar *v.* Prosser, Cowp. 217; Jackson *v.* Joy, 9 Johns. 102; Beverly *v.* Burke, 9 Ga. 440; De Haven *v.* Landell, 31 Pa. St. 120; Groft *v.* Weakland, 34 Pa. St. 304.

Exceptions sustained.

Continuity of possession is maintained by successive occupants, connected by privity of blood, grant, etc.

VANDALL *v.* ST. MARTIN.

Supreme Court of Minnesota, 1890.

42 Minn. 163.

COLLINS, J. This is an action to determine adverse claims. The plaintiff alleged title to the land in question in fee simple, and that he had occupied and possessed it as a homestead for more than twenty-five years. Defendants denied plaintiff's

alleged title, but admitted his possession for the period of sixteen years; thus conceding the fact and character of the possession, but not for the period of time claimed by the plaintiff. Much of the testimony received by the trial Court was objected to by appellant defendants, but we have discovered no prejudicial error, especially in view of the finding of fact upon plaintiff's claim of adverse possession for more than twenty years prior to the commencement of the action. The testimony clearly justified the Court in finding that it was the intention of all parties to include in the deed of date of January 25, 1859, executed and delivered by Paul Bibeau, at plaintiff's request, to Bibeau's daughter, then plaintiff's wife, all of the land then used and occupied by plaintiffs as his farm, but held in secret trust by Bibeau. And this same intention existed when, in the year 1880, the deeds were made which, as was supposed, placed the legal title to the farm in plaintiff. Under an arrangement for an exchange of lands made between plaintiff and Mardi, before purchasing from the general government, the small tract in question was to be deeded by the latter to plaintiff. On plaintiff's solicitation Mardi deeded it to Bibeau. The testimony was ample, in connection with the facts and circumstances, to warrant the conclusion that this tract was omitted solely by mistake from the Bibeau deed, and that the same mistake followed in the deeds made in 1880. It is evident that all parties supposed, until about the year 1884, that the description in the deeds covered the land in controversy. Bibeau, although living in the neighborhood until his decease in 1865, asserted no claim to it as owner or otherwise, and, after his death, his heirs, the appellants, claimed no rights prior to the making of the final decree in Probate Court in the matter of his estate, May 27, 1887, so far as we can discover. The plaintiff has always paid the taxes. The land was fenced by him more than twenty-five years prior to the bringing of this action, and has been farmed annually for more than thirty years. In the year 1870 a dwelling-house was built thereon, into which plaintiff and his family moved from an older house upon another part of the farm. Plaintiff

has occupied this dwelling-house ever since. From the time of the Bibeau deed, in 1859, down to the deed to the daughter, in 1880, the possession of Mrs. Vandall, plaintiff living with her and carrying on the farm, was exclusive, open, notorious, adverse, and continuous, under an honest claim of ownership. Since the deed to the daughter and her deed to plaintiff (all one transaction), the possession of the plaintiff has been of the same character. Laboring under a belief that the tract in controversy had been included in the description and conveyed by the Bibeau deed—as it should have been, undoubtedly—Mrs. Vandall in good faith commenced to assert an exclusive ownership in the year 1859, and thereafter, until 1880, for more than twenty years, maintained a continuous, exclusive, and adverse possession. Title by prescription could certainly, be acquired in this way: Smith *v.* Chapin, 31 Conn. 530; Bean *v.* Bachelder, 74 Me. 202. With this belief as to ownership in her mind, she transferred actual possession of the entire farm to her husband—who believed the same as to a perfect and complete title—in the year 1880, under a deed in which existed the same defect in description, and this possession he has since retained. The disseisin of Bibeau, resulting from the adverse possession of Mrs. Vandall, was not interrupted by the transfer of possession to her husband. The successive adverse possessions were connected by the privity which exists between two successive holdings when the later takes under the earlier, as by descent, will, grant, or by voluntary transfer of possession: Sherin *v.* Brackett, 36 Minn. 152 (30 N. W. Rep. 551), and cases cited. The possession must be connected as well as continuous, so that the possession of the true owner shall not constructively intervene between them; but such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of his possession in fact: Smith *v.* Chapin, *supra;* McCoy *v.* Trustees, 5 Serg. & R. 254. The plaintiff herein could tack his possession on to that of his wife.

While the testimony in this case may not have justified the Court below in finding, as it did, that plaintiff held adversely as early as March 1, 1856, it was obvious that Bibeau was disseised in 1859, immediately upon the execution and delivery of the defective conveyance. The testimony in support of the finding as to adverse possession for a period of at least twenty years immediately preceding the commencement of the action is abundant. It was competent to show that it was intended by the parties to include the land in question in the Bibeau deed, and that it was omitted by mistake, as tending to establish the claim that Bibeau's grantee had possession, from its date, in good faith, and with intent to hold adversely. And it was competent to show the same intention to convey, and a like omission in the deeds under which plaintiff took possession, for the purpose of presenting the relation of the possession taken by plaintiff to that relinquished by his wife.

Order affirmed.

Ramsey *v.* Glenny, 45 Minn. 401; Doe *v.* Campbell, 10 Johns. 477; Witt *v.* St. P. & N. P. Ry. Co., 38 Minn. 122.

Exclusive.

SMITH *v.* HITCHCOCK.

Supreme Court of Nebraska, 1893.

38 Neb. 104; 56 N. W. Rep. 791.

RAGAN, C. This is a suit in ejectment brought on November 9, 1889, in the District Court of Douglas County by Mrs. Charity Smith against Gilbert M. Hitchcock, for a part of lot 1, in Capitol Addition to the city of Omaha. This case was tried to a jury, who, under instructions of the Court, rendered a verdict for Hitchcock, and Mrs. Smith brings the case here for review.

Mrs. Smith has no paper title of any kind for any part of the property. Her claim is based wholly on possession. The record shows that on and prior to 1869 this lot, No. 1, being

668 feet in length north and south, and 218 feet in width east and west, was owned by Mrs. Annie M. Hitchcock. She died in 1887, and the lot by her will passed to her husband, the late Senator Hitchcock. He died in 1881, and the lot descended to his son, the defendant in error. About 1870, by permission of Mrs. Hitchcock and her husband, Mrs. Smith moved a small cottage she owned upon this lot 1, near the east line thereof, and lived in this cottage at that place until 1880. Mrs. Smith did laundry work from time to time during these years for the Hitchcock family and others. She also planted part of the ground near her cottage to a garden. During all these years the Hitchcock family, consisting of Mrs. Hitchcock, her husband, and the defendant in error, and others, lived upon the lot; had on it their barn, horses, cattle, and garden, and exercised exclusive ownership and control of the whole lot. During all this time it was all under one inclosure, built and maintained by the Hitchcocks; and that part occupied by Mrs. Smith's cottage was in no other manner, than by the cottage itself, separated or severed from the remainder of the lot. Mrs. Smith, during this period, by the permission and consent of Mrs. Hitchcock and her husband, and as a kind of non-rent-paying tenant at will, or sufferance, also occupied her cottage on the lot. She paid no taxes. She exercised no act of ownership over the lot or any definite portion of it. Thus matters continued until 1880, when Mrs. Smith, by the permission of Senator Hitchcock, who then owned the title to the lot as devisee of his deceased wife, and who still continued to occupy the lot with his family, removed her cottage to a point nearer the west line of said lot and some 250 feet southwest of its original location. This is the present location of the cottage. The usual occupation and control of the lot by the Hitchcocks continued as before this removal, and Mrs. Smith continued to live on uninterruptedly in her cottage. The senator died in 1881, and the defendant in error became the owner of the lot, and has since continued to reside upon it in the family homestead. In 1883 defendant in error erected three houses on a portion of

the lot now claimed by Mrs. Smith, which houses have since been occupied by tenants of the defendant in error.

In 1886 Douglas Street, 66 feet wide, was extended west across the entire lot, leaving the first location of Mrs. Smith's cottage north of said street. After the extension of Douglas Street, the defendant in error built fences on both the north and south lines of the street, thus dividing said lot into two separate inclosed portions; one being that part of said lot lying north of said Douglas Street, and on which Mrs. Smith's cottage was first located, and on which the Hitchcock homestead and the three tenant houses aforesaid are situate; the other portion being all of said lot 1 south of Douglas Street, and on which portion is now Mrs. Smith's cottage. No claim for damages was made by Mrs. Smith at the time of the extension of this Douglas Street, nor did she assert or claim any ownership over the land taken for such extension, though now she claims that the land used for such extension was her property. She asserted no claim of ownership or title to any of the property at the time of the building of the tenement houses by the defendant in error.

Mrs. Smith, to recover here, must prove either a paper title or prove ten years' open, notorious, exclusive, and adverse possession. She has no paper title. She occupied, by living in her cottage, a part of this lot openly and notoriously for ten years, but no specific or definite part of the lot other than the *situs* of the cottage itself. Her possession of the lot was also concurrent with that of the owner of the legal title. It was a mixed possession; not an exclusive one. The defendant in error, the holder of the legal title, has never been out of possession of the property claimed by Mrs. Smith, and this negatives any legal presumption that her possession was adverse to his title or possession: Green *v.* Liter, 12 U. S. 229; Proprietors Kennebeck Purchase *v.* Springer, 4 Mass. 415.

But as a matter of fact or law, was Mrs. Smith's possession of this property adverse? She entered by permission of the owner, and in 1880, by his permission, moved her cottage to another part of the same premises, not involved in this case.

To constitute her possession or occupancy adverse, she must have actually held and occupied the property as her own, and in opposition and hostility to the concurrent and constructive possession of the owner of the legal title: French *v.* Pearce, 8 Conn. 439; Newell Ejectment, p. 697, § 1. There is no evidence in the record that establishes, or tends to establish, the fact that Mrs. Smith's possession was an adverse one; nor that she entered into possession of these premises with the intention of claiming them as her own, or that she ever held after her entry in hostility to the defendant in error. Mrs. Smith's entry on this lot was by permission of the owner of the legal title, and her possession thereafter was permissive and not adverse; nor could it become so until such time as she began to occupy under a claim of right, with notice of such claim brought home to the owner: Harvey *v.* Tyler, 2 Wall, U. S. 328; Allen *v.* Allen, 58 Wis. 202–209; Perkins *v.* Nugent, 45 Mich. 156; Davenport *v.* Sebring, 52 Ia. 364; Pease *v.* Lawson, 33 Mo. 35; Smith *v.* Stevens, 82 Ill. 554; Angell, Limitations, § 354. The Court did not err in instructing the jury to find for the defendant.

Complaint is made because of the refusal of the trial Court to permit witnesses of the plaintiff in error to answer certain questions propounded to them on the trial. No tender or offer of the evidence sought to be elicited by these questions was made, and these assignments cannot now be considered: Masters *v.* Marsh, 19 Neb. 458; Connelly *v.* Edgerton, 22 Neb. 82; Yates *v.* Kinney, 25 Neb. 120; Burns *v.* City of Fairmont, 28 Neb. 866.

Another error assigned is the overruling of the motion for a new trial on the ground of newly discovered evidence. To entitle the plaintiff to a new trial on account of newly discovered evidence, it is not enough that the evidence is material. It must further appear that the applicant for a new trial could not, by the exercise of reasonable diligence, have discovered and produced such evidence at the trial: Fitzgerald *v.* Brandt, 36 Neb. 683. The proof fails to disclose such diligence on the part of the plaintiff in error as entitled her to a new trial on

the ground of newly discovered evidence; but if it did, and the evidence now claimed to be newly discovered was put into the record, it would not change the result. A new trial should not be granted on account of newly discovered evidence when such evidence, if admitted, could not change the result of the first trial: Keiser *v.* Decker, 29 Neb. 92.

The judgment of the District Court is affirmed.

Thomas *v.* Inhabitants of Marshfield, 13 Pick. 240; Alexander *v.* Meyers, 51 N. W. Rep. 140; 33 Neb. 773; Kilburn *v.* Adams, 7 Met. 33.

Hostile or Adverse.

DEAN *v.* GODDARD.

Supreme Court of Minnesota, 1893.

55 Minn. 290; 56 N. W. Rep. 1060.

BUCK, J. The question raised in this case is whether the plaintiff has acquired title by adverse possession to the premises described in the complaint, viz., the front half of lots 1 and 2 in block 67, in the city of Minneapolis. The action was commenced in August, 1891. In his complaint the plaintiff alleges that he is in possession, and is the owner in fee simple, of the premises above described, and that the defendants claim some estate or interest in the premises adverse to the plaintiff, and prays that the claims of the respective parties be adjudged and determined, and that title to said premises be decreed to be in the plaintiff. The defendant Goddard answered, and alleged the title in fee to be in himself. The plaintiff replied, and such reply will be referred to hereafter. Plaintiff's contention is that he acquired title by possession held adversely for such a length of time as to create a title in himself.

Under Gen. St. 1878, c. 66, § 4, the time limited for commencing actions for the recovery of real property was fixed at twenty years; but on April 24, 1889, the law was changed to fifteen years—not to take effect, however, until January 1, 1891. The law, as amended, would be applicable to actions com-

menced after January 1, 1891, and prior to the time of the commencement of this action, in August, 1891; but this would not render the law existing prior to the amendment inapplicable to causes of action, when there was twenty years' adverse possession before the time when the change took effect. The period, however, relied upon, need not be the twenty years immediately preceding the 1st day of January, 1891. It would be sufficient if the possession relied upon was continuous for twenty years up to any certain or definite time. Of course, the twenty years would have to be complete before the bringing of the action; but such twenty years need not, necessarily, be those next before the time when the action is commenced. In this case, if the inception of the plaintiff's adverse possession was in the months of June or August, 1866, and became perfect by continued adverse possession until the month of June or August, 1886, then the title thereby created would not be lost or forfeited by any subsequent interruption of the possession, unless by some other adverse possession for such a length of time as would create title in the possessor.

The Court below found the allegations in the plaintiff's complaint to be true, and that he was, at the time of the commencement of this action, the sole owner, in fee, and in the lawful possession, of the premises described in the complaint, and that his grantors and predecessors in interest had been in the open, continuous, exclusive, and adverse possession of the premises, with color of title, and paying taxes thereon, for a period of twenty years, and that he was entitled to the decree and judgment of the Court declaring him to be the absolute owner of the premises. We think a title acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed. The legal effect not only bars the remedy of the owner of the paper title, but diverts his estate, and vests it in the party holding adversely for the required period of time, and is conclusive evidence of such title. To say that the statutes upon this subject only bars the remedy, as some authorities do, is only to leave the fee in the owner of the paper title; thus leaving the owner with a title, but without a remedy. We think the better and

more logical rule is to hold that the occupier of the premises by adverse possession acquires title by that possession, predicated upon the presumption or proven fact that the prior owner has abandoned the premises. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance, and when he does so he is conveying his own title, and not a piece of land where the title is in some other person, who is simply barred of any remedy from recovering it. See Campbell *v.* Holt, 115 U. S. 620, 6 Sup. Ct. Rep. 209; Baker *v.* Oakwood, 123 N. Y. 16, 25 N. E. Rep. 312, and cases there cited. Now if there is any cloud resting upon such title he has a legal right to apply to the Court and have his rights adjudicated, and the title perfected by judgment record, if the evidence sustains his claim. Considerations of public policy demand that this should be so, for the claim of title to lands can thus be found of record, instead of resting in parol, with all of its incidental dangers and trouble is establishing title.

Now, let us consider the question raised by the defendant, as to whether one of the plaintiff's predecessors, Washburn, entered into the adverse possession of the premises June 1, 1886, or August 28, 1866. The plaintiff claims such entry was on the 1st day of June, and the defendant insists that the true date, if there was any such adverse entry at all, is shown by plaintiff himself, in his reply, to be August 28, 1866. The importance of these dates arises from the fact that there is evidence tending to show an adverse possession of the premises by the predecessors of plaintiff until the middle of July, 1886; and if the period of twenty years commenced June 1, 1866, of course, the expiration of that period would be June 1, 1886, and if the period commenced August 28, 1866, the twenty-year period would expire August 28, 1886. Thus, the true date becomes material. The plaintiff, in his amended reply, inserted the following allegation, viz.: "That on or about the 1st day of June, 1886, and more than fifteen years prior to the commencement of this action, said William D. Washburn, under the deed hereinbefore recited, executed to him by said Lindley, and claiming thereby to be the owner of said premises, entered into pos-

session and actual occupation of the same." The deed referred to bears date August 28, 1866. It may be that there is sufficient undisputed evidence to show an adverse possession during this particular time; but we think that, under the circumstances, the parties are entitled to the opinion of this Court upon this phase of the case. The fault of the defendant's position is this: That he allowed the plaintiff to introduce and prove beyond dispute, by parol evidence, without objection, that Washburn entered upon these premises June 1, 1866. The rule, therefore, that the written allegations of the pleadings should control, does not apply. The defendant did not move to have the pleadings made certain and definite, nor to compel the plaintiff to elect upon which of the dates he would rely as the time of Washburn's entry upon the premises; but remained silent, and allowed the date of June 1, 1866, to be undisputably proven by the plaintiff. The allegations in the reply were repugnant as to the dates of Washburn's entry; but the defendant, by his conduct, waived his right to insist now that the date of such entry should be determined as of August 28, 1866. He is estopped by the admitted parol evidence from insisting that the written pleadings should be construed in his favor, and against the plaintiff.

There is no dispute, however, that Washburn did procure a deed of the premises from Lindley, dated August 28, 1886; and the defendant therefore contends that Washburn's entry, if adverse at all, should only be considered as having commenced on the date of the deed. To support this contention he invokes the doctrine that one who enters upon land under a mere agreement to purchase does not hold adversely, as against his vendor, until his agreement has been fully performed, so that he has become entitled to a conveyance. This doctrine is not applicable to this case. Washburn's entry and holding was not under this defendant, nor any of his predecessors holding paper title. As we have already stated, it appears that he was in possession on the 1st day of June, 1866; and whether by permission of Lindley, or by his own voluntary entry, is immaterial as to his rights against parties other

than Lindley, and Lindley is not complaining, or questioning his rights, or time of entry. Nor is defendant claiming title under Lindley. If permissive possession, with parol executory conditions attached, would not constitute adverse possession as between the parties, yet it might constitute adverse possession as against third persons or strangers. Washburn's entry was adverse as against those under whom defendant claims by paper title. If, therefore, Washburn's entry of June 1, 1866, was his own adverse act, and he so continued in possession of the premises until long after August 28, 1866, there is no need of considering the doctrine of tacking, or the necessity of the continuity of possession. Obtaining a deed to the premises from Lindley would not destroy Washburn's previous adverse possession, nor break its continuity. He has a right to strengthen his adverse claim to the premises, if possible, by as many written conveyances from other parties claiming any interest therein as he saw fit, and thus giving him color of title, and perhaps define the boundaries of the premises claimed by him.

The essential ingredients necessary to create title by adverse possession are now so well defined and understood that we shall not enter into any argument or discussion to show what they are. We merely state them in this connection that we may the more conveniently apply them to the undisputed facts in this case. "To be adverse possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intention to claim adversely:" Sherin *v.* Brackett, 36 Minn. 152, 30 N. W. Rep. 551. This leads us to the question raised by defendant—that the Court below did not find, specifically, that plaintiff's possession, or the possession of his predecessors, was hostile. But it did find that such possession was open, continuous, exclusive, and adverse during the requisite period. The greater includes the less. If it was adverse, it was hostile. In Sedg. & W. Tr. Title Land, § 749, it is said that "it is tautology to say that adverse possession must be 'hostile.'" Such hostility may be manifested by acts of possession and use of the premises, plainly visible, actual, open, and continuous, such as

appeared in this case, by using the premises for many years as a lumber-yard, building a barn and shed thereon in 1866 or 1867, and keeping the same on the premises until they burned down, in March, 1884, and keeping a large number of horses on the premises and in the stables for many years. Also, storing machinery, lamp-posts, castings, and other personal property, putting a large sign on the lot, with notice thereon that it was for rent, for a long term of years, were acts of hostility, as tending to show very strongly that some one was assuming dominion over the premises, and had intended to or was usurping the possession.

If, as was said by the Court in Stephens *v.* Leach, 19 Pa. St. 263, the adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner should reasonably keep his own banner unfurled. The law, which he is presumed to know, is a continual warning to him that if he shall allow his lands to remain unoccupied, unused, or unimproved, and uncultivated, by adverse possession for a long period of time, fixed by law, he may be disseised thereof, and deemed to have acquiesced in the possession of his adversary. In this case the actual owners by paper title have never occupied the premises since the first owner obtained his title from the government, in 1855 or 1856. Considerations of public policy demand that our lands should not remain for long periods of time unused, unimproved, and unproductive. Taxes should be promptly paid. It nowhere appears that the owners by paper title have ever paid any taxes; but they have allowed the adverse occupants, during a period of many years, to pay nearly $5,000 taxes upon the premises. Payment of taxes shows claim of title: Paine *v.* Hutchins, 49 Vt. 314. We can readily understand how these statutes are called "statutes of repose." The burdens of government must be met; its educational interests provided for; its judicial, legislative, and executive functions maintained; and to do this our real property must be made productive, to the end, among other things, that taxes may be raised and paid from land not subject to continual litigation, but the titles thereto quieted. If the selfish, the indo-

lent, and the negligent will not do this, there is no more merit in their claim than that of the adverse possessor, who does so, whatever may be said of the harshness of the statute of limitation. The settlement and improvement of the country, with its consequent prosperity, should be superior and paramount to the speculative rights of the land-grabber, or selfish greed of those who seek large gains through the toil, labor, and improvements of others. The hostile possession of the adverse claimants in this case fully appears. The possession has been open, visible, hostile, and notorious, as appears from the evidence. It has been exclusive, for no one else has made any claim to it. Those who have been on the premises, other than plaintiff or his predecessors, have made no claim of right, but have paid rent to the adverse claimant, or were there simply as trespassers, which would not break the continuity of possession. The intent to claim may be inferred from the nature of the occupancy. Oral declarations are not necessary. Possessory acts, so as to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fit or adapted. If a person should take possession of farm land, build a barn and shed thereon, and allow them to remain there for years, plow and cultivate and harvest the crops, paying taxes on the premises, and actually occupying them for such a period of time, as is usually done by the actual owners of such farm land, with such open, notorious, visible, hostile, and exclusive acts as would destroy the actual or constructive possession of the true owners, if continued long enough, it would ripen into a complete title, although there might not be actual residence upon the premises by the adverse claimant or possessor. The acts necessary for such purpose might be different with a city lot. The question is as to what purpose it may be ordinarily fit and adapted and reasonably used. In a large manufacturing city, with vast lumber interest, the use of a lot for piling lumber thereon, and there storing it or keeping it for sale, might be the best use to which such lot could possibly be adapted. And, as part of such business, the building of a barn and shed thereon,

for keeping and stabling horses used in procuring logs, as a part of such lumber business, would constitute a very strong ingredient of adverse possession.

The mere fact that time may intervene between successive acts of occupancy, while a party is engaged in such lumber business, as by taking his teams from such stable and shed, and using them in procuring logs to be sawed into lumber to be by him piled and stored upon such premises, does not necessarily destroy the continuity of possession. During such time, the lumber left upon the lot, the barn and shed there remaining, and various implements connected with such lumber business used upon the premises, would indicate that some one was exercising acts of domain over the lot, even though the party was occasionally and temporarily absent upon the business for which he was using such lot.

We think the whole record herein presents such a state of facts that the Court below was justified in its finding and decision. If there was error in the Court admitting testimony showing that sand was removed from the premises after the commencement of this action, it certainly could not have prejudiced the defendant. We find no prejudicial error, and the order of the Court below, denying a motion for a new trial, is affirmed.

Sherin *v.* Brackett, 36 Minn. 152; Ballard *v.* Hansen, 51 N. W. Rep. 295.

Adverse possession may extinguish a public easement: Webber *v.* Chapman, 42 N. H. 326; St. P. & D. Ry. Co. *v.* Hinckley, 53 Minn. 398. *Contra:* Brooks *v.* Riding, 46 Ind. 15.

Entry under Color of Title.

If one enter under color of title (being a title in appearance but not in reality), he has constructive possession of all the land described in the conveyance and may acquire a title to the whole by adverse possession.

GATLING *v.* LANE.

Supreme Court of Nebraska, 1885.

17 Neb. 77; 22 N. W. Rep. 453.

MAXWELL, J. An opinion was filed in this case which is reported, 22 N.W. R. 227, the facts are therein stated. A motion for a rehearing has been filed by the plaintiff, accompanied by an elaborate brief, and as some of the questions raised are not fully discussed in the former opinion we will state our reasons for denying a rehearing: 1. The plaintiff alleges that the tax deed under which the defendants claim is void upon its face, and hence is not color of title. In McKeighan *v.* Hopkins, 16 Neb. 316, s. c. 15 N. W. Rep. 711, it was held that a tax certificate was not sufficient to constitute color of title. The reason is, a tax certificate does not purport to convey title. At most, it is evidence that the holder or his assignor purchased the real estate described therein at tax sale, and that, after the time of redemption has expired, if the land is not redeemed, the holder will be entitled to a tax deed. An instrument, to create color of title, must purport to convey the title to the grantee. It is not essential that it do so, however: Bride *v.* Watt, 23 Ill. 507; Beverly *v.* Burke, 9 Ga. 440–444. A tax deed which purports to convey the title to the grantee is sufficient color of title, under which open, notorious, exclusive, adverse possession for ten years will operate as a bar; and this, too, although on its face it may fail to recite the place of sale: McGinnis *v.* Edgell, 39 Iowa, 419; Colvin *v.* McCune, Ib. 502; Sutton *v.* Stone, 4 Neb. 319; Rivers *v.* Thompson, 43 Ala. 633; Elliott *v.* Pearce, 20 Ark. 508. And as the defendants have been in the open, continued, and ex-

clusive adverse possession of the premises in question for more than ten years, under claim and color of title, the action of the plaintiff is barred: Grant *v.* Fowler, 39 N. H. 101; Farrar *v.* Fessenden, Ib. 268; Elliott *v.* Pearce, 20 Ark. 508; Cofer *v.* Brooks, Ib. 542; St. Louis *v.* Gorman, 29 Mo. 593.

2. But even if the defendants entered and retained possession of the premises without color of title, still the action is barred. A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive, adverse possession of the premises for ten years, thereby disseises the owner; and this is so, whether the entry and possession are contrary to the right of the owner or not, if the occupant denies the owner's title and claims the land as his own: Hamilton *v.* Wright, 30 Iowa, 480; Close *v.* Samm, 27 Iowa, 503; Solberg *v.* Decorah, 41 Iowa, 401; Yetzer *v.* Thoman, 17 Ohio St. 130; Towle *v.* Ayer, 8 N. H. 57; Melvin *v.* Proprietors, 5 Metc. 15; Brown *v.* King, Ib. 173; Poignard *v.* Smith, 6 Pick. 172. No color of title is necessary to constitute an adverse holding: Campau *v.* Dubois, 39 Mich. 274. But one entering upon lands adversely, without any deed or color of title, is restricted to the land actually occupied by him, and is not entitled to go beyond the limits of his actual occupation: Coburn *v.* Hollis, 3 Metc. 125; Jackson *v.* Schoonmaker, 2 Johns. 234; Hale *v.* Glidden, 10 N. H. 397; Ferguson *v.* Peden, 33 Ark. 150; Wilson *v.* McEwan, 7 Or. 87; Schneider *v.* Botsch, 90 Ill. 577; Foster *v.* Letz, 86 Ill. 412; Wells *v.* Jackson Manuf'g Co., 48 N. H. 491; Wood, Lim., 514. It is impossible to harmonize the cases relating to possession without color of title. Many of the older cases, where the statute of limitations was looked upon with disfavor, and regarded as a statute of presumptions, seem to hold that, to constitute a valid and effectual adverse possession, the possession must have commenced under color of title: Tyler, Adv. Poss. 859 *et seq.*, and cases cited. The statute is now held to be a statute of repose, which is available against the enforcement of stale demands: Mayberry *v.* Willoughby, 5 Neb. 368. The effect of the statute

is to quiet titles to real estate by fixing a time within which the actual owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period, the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner, but all the world: Trim *v.* McPherson, 7 Coldw. 15; Abell *v.* Harris, 11 Gill & J. 367; Cooper *v.* Smith, 9 Serg. & R. 26. And this rule will apply as to the land actually occupied, if the possession was adverse, whether the party held under color of title or not. As the defendants in this case were in actual adverse occupation of the entire lot for more than ten years before the commencement of the action, the action to recover possession of the lot in question is barred.

3. In November, 1858, the Code of Civil Procedure became a law in this then Territory, to take effect on the first day of April, 1859. The Act had a proper title, and the Code, as then adopted, is in substance our present Code. In 1866 the laws were revised, and all the general laws embodied in one bill, and passed by the Legislature as one Act, and is known as the "Revised Statutes of 1866." In this revision the Code is designated as the "Code of Civil Procedure." In Miller *v.* Hurford, 13 Neb. 17–19, s. c. 12 N. W. Rep. 832, the question of titles of amendatory Acts is considered, and it was held that the title of an Act was not obnoxious to the Constitution because it was to amend certain sections (naming them) of an Act (giving the title and date of approval by the Governor). This form of title is not as definite, perhaps, as could be desired, but so long as the amendments are germane to the Act amended, no Court would be justified in holding that the Act was void. Within the limits fixed by the Constitution, the Legislature has the right to select such title to an Act as may seem to it proper and right, and it is only when these limits are transcended that the Court will declare the Act unconstitutional. The amendment in this case, although general in its terms as applicable to the Code, was not void. It reduced the time within which an action for the recovery of real estate may be brought to ten years, and this provision is valid and

of full effect. The plaintiff's cause of action is therefore barred. A rehearing must be denied.

"Color of title" defined: Brooks *v.* Bruyn, 35 Ill. 392; Tyler on Ejectment; Jackson *v.* Woodruff, 1 Cow. 276; Bristol *v.* Carrol, 95 Ill. 93; Swift *v.* Mulkey, 17 Or. 532; Clark *v.* Potter, 32 Ohio St. 49; Humphries *v.* Huffman, 33 Ohio St. 403; Jackson *v.* Warford, 7 Wend. 62; Ellicott *v.* Pearl, 10 Pet. 412; Wright *v.* Mattison, 18 How. 50; Murphy *v.* Doyle, 37 Minn. 113.

Entry as an Intruder.

If one enter as an intruder, or under a parol gift, without color of title, he can acquire a title to only that quantity of land which he actually occupies.

ALLEN *v.* MANSFIELD.

Supreme Court of Missouri, 1892.

108 Mo. 343; 18 S. W. Rep. 901.

BLACK, J. This is an action of ejectment for a lot in the city of St. Joseph. Plaintiff appealed from a judgment for defendant. Both parties claim under Allen G. Mansfield, who died testate in the year 1867. In 1874 his widow, heirs, and devisees executed a partition deed conveying the lot in question to William Mansfield whose title the plaintiff acquired by a sheriff's deed, dated June 13, 1877.

The defendant is a colored person, formerly the slave of Allen G. Mansfield. Her defense is an alleged parol gift of the lot to her by her former master, and the statute of limitations. The proof offered in support of this defense discloses these facts: In 1865, Mr. Mansfield built a small house or shanty on the east or alley end of the lot and then moved the defendant and her two children into it. She continued to reside there until the commencement of this suit in 1886. At the time he built the shanty he had the lot surveyed and staked off. And in the year of 1865 or 1866 built a fence around the entire lot at his own expense. Three or four years thereafter a large part of the fence was washed away. Thereafter

some one, probably the defendant, reconstructed part of the fence from time to time so as to include the shanty and a part only of the lot in the inclosure. The evidence tends to show that she dug a well and planted some trees in the inclosed part, and that she, for a time at least, had a small pig-pen on the uninclosed part. Four or five witnesses, some of them colored persons, testified to conversations with Mr. Mansfield in the year 1865, in which he is reported to have said that he was going to give the property to Malinda. Some of them on further examination say he said he gave Malinda the house and lot and a cow. One of these witnesses, a colored woman, testified that Malinda wanted to go to Iowa and Mr. Mansfield wanted her to remain at St. Joseph; that Mr. Mansfield sent his daughter for Malinda, then at another house in the city; that he then said, in the presence of his daughter, the witness, and Malinda, that he would give her the lot if she would remain at St. Joseph. According to this witness the conversation was quite a formal affair; but the daughter testified that she knew of no such a conversation. The evidence of this daughter and that of another person is to the effect that Mr. Mansfield moved the defendant to the lot in question because she was not trustworthy about the house.

Plaintiff paid all of the taxes on the lot since his purchase in 1877. He offered to show that the Mansfield estate paid the taxes during the time the estate was in process of settlement, but this evidence the Court excluded. The further evidence of plaintiff is, that he had the lot surveyed in 1878; that about that date he built a three-room house on the west one hundred feet and inclosed the whole lot with a new fence; that the west one hundred feet was then uninclosed, and that the old fence around the shanty included only thirty-five or forty feet of the east end of the lot; that he was at the premises nearly every day during the construction of the house and fence, and that the defendant made no objection and set up no claim of ownership. This evidence is corroborated by persons who built the house and stands undenied. Plaintiff says he saw defendant just after his purchase, and she then asked per-

mission to remain on the lot, and he told her she could remain there until he desired to build.

At the request of the defendant the Court gave the following instructions: "If the jury believe from the evidence that about the year 1865 Allen G. Mansfield had the premises described in plaintiff's petition surveyed, built a house thereon, and verbally gave the same to defendant and put her in possession thereof, and that defendant has ever since said date been so in possession of the whole or any part thereof, claiming to own the whole of said lot, and that said possession has been open, notorious, and actual under claim of ownership, then the jury will find for defendant."

This instruction, it will be seen, directs a finding for the defendant as to the whole lot, though she may have had actual possession of only a part of it for the period of ten years. It proceeds upon the proposition that if Mansfield surveyed the lot, built a shanty upon it, verbally gave the lot to the defendant, and put her in possession, then such facts constitute color of title; that under these circumstances possession of a part will draw to it constructive possession of the whole.

It is to be observed in the first place that there is no evidence of improvements made by the alleged donee or other circumstances to take the alleged parol gift out of the statute of frauds. As stated by counsel for the defendant it is title by adverse possession, not by gift, which will defeat the plaintiff. Continuous adverse possession under a parol gift for the statutory period will not only constitute a perfect defense, as against the donor and those claiming under him, but it will confer title upon the donee: Campbell *v.* Braden, 96 Pa. St. 388; Moore *v.* Webb, 2 B. Mon. (Ky.) 282; Outcalt *v.* Ludlow, 32 N. J. L. 239; Sumner *v.* Stevens, 6 Met. (Mass.) 337; Clark *v.* Gilbert, 39 Conn. 94. In all these cases there was actual possession of the entire property embraced in the parol gift, so that they do not dispose of the question in hand. To make possession of a part of a tract of land possession of the whole, there must be color of title to the whole, and the real question is whether the facts recited in the instruction constitute color of title.

In a case like this, where there is a claim of constructive possession flowing from actual possession of a part, it is necessary to bear in mind that claim of title and color of title are different things. Claim of title does not necessarily include color of title. The definitions and descriptions of color of title given in the books are various and conflicting. It is, we think, safe to say that any writing which purports to convey land and describes the same is color of title, though the writing is invalid, and conveys no title: Fugate *v.* Pierce, 49 Mo. 441; Hamilton *v.* Boggess, 63 Mo. 231; Hickman *v.* Link, 97 Mo. 482. In Fugate *v.* Pierce, it was said constructive possession is never based upon a claim merely; "there must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession." This doctrine was approved in Long *v.* Higginbotham, 56 Mo. 245. The claim must be "evidenced by some paper, or proceeding, or relation, that makes the claimant the apparent owner of the whole:" Crispen *v.* Hannavan, 50 Mo. 536. These cases all lead to the conclusion that to constitute color of title there must be some documentary evidence, and so it is generally held: Sedg. & Wait on Trial of Land Titles, (2d ed.), §§ 769, 772.

There are some cases which appear to assert a different rule. In Rannels *v.* Rannels, 52 Mo. 108, the plaintiff purchased the land for his sister, but took the deed to himself. He had the land surveyed, showed it to her, built a house upon it, and then made a verbal gift of it to her. He put her and her family in possession under the survey and description in his deed. She and her family occupied the house, "and exercised open and notorious acts of ownership over the remainder of the tract up to her death; and the remainder of her family since her death." Notwithstanding these facts the question seems to have been made whether the verbal gift and delivery of possession thereunder constituted color of title "to that portion of the tract of land not inclosed nor in actual possession;" and it was held that they did. Says the Court: "It is not necessary that this color of title should be created by deed

or other instrument of writing. It may be created by an Act *in pais* without writing." Several cases are cited in support of the rule there stated. That of McCall *v.* Neeley, 3 Watts, 69, had been before and has since been noticed by this Court, and some of the observations there made held to be inapplicable to our system of land titles: City of St. Louis *v.* Gorman, 29 Mo. 593; Mylar *v.* Hughes, 60 Mo. 105.

In Sumner *v.* Stevens, *supra*, there was actual possession of the entire property, and the question of constructive possession from possession of a part under color of title to the whole does not appear to have been involved in the case. In Bell *v.* Longworth, 6 Ind. 274, Longworth claimed the land under a written assignment of a certificate of purchase from the United States, so that case, on its facts, does not appear to be an exception to the general rule, though the language used in the opinion as to what will constitute color of title is very broad. The Rannels case was cited with approval in the subsequent cases of Cooper *v.* Ord, 60 Mo. 420, and Hughes *v.* Israel, 73 Mo. 538. Those cases were, however, in their facts, quite unlike the Rannels case. The doctrine of that case was also approved in the case of Davis *v.* Davis, 10 So. Rep. 70. The Rannels case is clearly exceptional in its character, so far as it defines color of title, though the conclusion reached is right on the facts given in the statement. According to the statement the donee and her heirs had actual possession of the entire tract as against the donor.

As said in Clark *v.* Gilbert, *supra:* "Much has been said about an open, notorious possession, but such expressions are not applicable to a case like this. Possession taken under a parol gift is adverse in the donee against the donor, and, if continued for fifteen years, perfects the title of the donee as against the donor. The donor in such cases not only knows that the possession is adverse, but intends it to be, and there is no occasion for any notoriety. Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Of course, where it is shown that he had actual knowledge that the possession was

under claim of title, and, therefore, adverse, openness and notoriety are unimportant, for no other person has any legal interest in the question or right to be informed by notoriety or otherwise." See, also, Sedg. & Wait on Trial of Land Titles, (2d ed.), § 735. On these grounds the Rannels case can stand without question or doubt, for there was, as against the donor, sufficient actual possession of the whole tract, and color of title was not necessary to a complete defense, and that case stands on no other grounds.

But in this case the instruction allows a complete defense, though defendant may have had actual possession of a part only for the statutory period of time. Possession of a part to draw to it possession of the whole, under the statute of limitations, must be under color of title. The facts that Mansfield staked off the lot, built a house upon it, made a verbal gift of the lot to defendant and put her in possession are sufficient to show adverse possession of the whole, as against Mansfield and his heirs; but such facts do not constitute color of title. The instruction is, therefore, erroneous, and should not have been given.

2. The trial Court also erred in excluding the receipts offered in evidence by the plaintiff, showing payment of taxes by the Mansfield estate. The fact that Mansfield placed the defendant in possession under a parol gift is evidence that she held adversely to his estate. On the other hand, there was evidence tending to show that her possession was not hostile. The question whether the defendant's possession was adverse, that is to say, under a claim of ownership, was an important issue in the case. The defendant went into possession in 1865, and Mr. Mansfield died in 1867. Non-payment of taxes by the defendant and payment of them by the estate is additional evidence tending to show that the possession was not under claim of ownership, and should have been received: Gaines *v.* Saunders, 87 Mo. 557-564.

3. The Court admitted the evidence to the effect that plaintiff built a house on the west end of the lot with the knowledge of the defendant, and that she made no objection and set

up no claim of title, but excluded evidence showing the value of these improvements. The more valuable the improvements, the more it became the duty of defendant to make known her claim, if any she had, and the greater the probability that she then made no claim of ownership. Evidence of the extent and of the value of the improvements should have been received.

4. Two instructions were asked by the plaintiff, but refused, concerning an estoppel as to the uninclosed part of the lot upon which the plaintiff erected the three-room house. There is evidence to the effect that, after the plaintiff purchased the lot, he saw the defendant and she obtained permission from him to remain in the shanty; that he had no notice or knowledge of the alleged parol gift; that he built the house and made the improvements believing that he was the real owner, and that defendant was present all the while, saw the improvements going on, but made no objection or claim of ownership to the lot. Under these facts, we think she should be held estopped from asserting title to the uninclosed part, and this is all the refused instructions claim. An instruction to the foregoing effect should be given.

Proprietors, etc., *v.* Spring, 4 Mass. 416; Swift *v.* Mulkey, 17 Or. 532.

Entry may be by agent or tenant: Fleming *v.* Maddox, 30 Iowa, 241; Elliott *v.* Dycke, 78 Ala. 150.

Possession by wife: Morrell *v.* Ingle, 23 Kan. 32.

Family burying-ground will constitute actual possession as to the part occupied by the graves: Mooney *v.* Cooledge, 30 Ark. 655.

Occasional trespasses, accompanied by avowals that the trespasser intends to hold possession, are not sufficient: Ewing *v.* Alcorn, 40 Pa. St. 492.

Entry under color of title must be in good faith by the grantee, who actually believes he is getting a good title: Watts *v.* Owens, 62 Wis. 512; 22 N. W. Rep. 720.

Fraud on the part of the grantor will not affect the innocent grantee: Foulke *v.* Bond, 41 N. J. L. 527.

C

Accretion.

The owner of land bounded by a river is entitled to the accretions thereto made by imperceptible deposits of alluvion, whether such river is navigable or non-navigable.

LOVINGSTON *v.* ST. CLAIR COUNTY.

Supreme Court of Illinois, 1872.

64 Ill. 56.

This action of ejectment was commenced by the county of St. Clair against Lovingston and others to recover possession of certain lands on the Mississippi River. Plaintiff claimed title under an Act of Congress donating swamp lands to the county, and defendant claimed title to it by accretion. The land was bounded on one side by the river.

Mr. Justice THORNTON. If the land of the riparian proprietor was bounded by the Mississippi, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.

The navigability of the stream, as the term is used at common law, has no applicability to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case the only question is, have the United States, or the State, or the riparian owner, the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway, like the Mississippi, floating an immense commerce, and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can

it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsion upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to undertake, under such circumstances, to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

We then assume that the Act of Congress of 1796 (1 Stat. 468, § 9), which declares all navigable rivers in a certain district, public highways, has no bearing upon the questions to be considered. The riparian owner has a right to the alluvion, whether the stream be navigable or unnavigable.

Blackstone says (2d book, 262), as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owners of the land adjoining. "For *de minimis non curat lex;* and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal condition for such charges or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi River.

In Middleton *v.* Pritchard, 3 Scam. 510, this Court said: All alluvions belong to the riparian proprietor, both by the common and civil law.

In the case of The King *v.* Lord Yarborough, 3 Barn. & Cress, 91, land gained from the sea by alluvion or projection of extraneous matter, whereby the sea was excluded and prevented from overflowing it, was adjudged to be parcel of the demesne lands of the adjacent manor.

The question has been discussed with profound research and

great ability by the Courts in Louisiana, as to the accretions upon this same river, and the law clearly announced.

In Municipality No. 2 *v.* Orleans Cotton Press, 18 Louisiana, 122, it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land; that cities as well as individuals had the right to acquire it, *pere alluvionis*, as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed and the burden of protecting the estate. The Court further assimilated the right to the right of the owner of lands to the fruits of a tree growing thereon, and said: "Such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the Legislature had declared that, after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."

The same principle was declared in Banks *v.* Ogden, 2 Wall. U. S. 57, as applicable to Lake Michigan.

See, also, The Mayor, etc., of New Orleans *v.* The United States, 10 Peters, 662; Jones *v.* Soulard, 24 Howe, U. S. 41.

The same doctrine is fully declared in a recent case: Warren *v.* Chambers, 25 Ark. 120.

To determine the title to the accretion, we must ascertain the locality of the land of the adjacent owner. We need not enter upon a discussion of the laws of Congress and of the State, by virtue of which the county claims title, if the land previously granted by the United States was bounded by the river, and the accretion is attached to it.

Hilgard, the surveyor, testified that the accretion was all west of the Condaire tract. The only portion of the field notes we desire to call attention to is the following: "To a post on the westerly side of the river L'Abbe, or Cahokia Creek, thence down the said river or creek, with the different courses thereof," and, "thence N. 85 deg. W. 174 poles to a post on the bank of the Mississippi River, from which thence N. 5 deg. E. *up the*

Mississippi River, and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey No. ——, claim No. 100." This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia Creek meanders with the stream, which was sinuous, and hence the call in the notes, "down the said creek with the different courses thereof."

A further examination of the plat will show that, though the line from "a post on the bank of the Mississippi River," "to a post northwesterly corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river bank, as indicated by the plat, was also straight in 1815. The Condaire survey embraces three militia claims, which had been surveyed before, and which were confirmed to Jarrot.

One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, etc.

The defendants traced title from patent confirmatory of these several surveys, and they also proved title to "Bloody Island," which, when surveyed in 1824, was three-fourths of a mile north of the tract in controversy.

In behalf of the county, it is assumed that the patent to survey 579 contains no indication that the river is the boundary; that the west line of the Condaire claim, being the line next to the river, is identical with the west line of the militia claims; that Condaire took no portion of the militia claims, but only the fractions east of them and between them and Cahokia Creek; that the lands granted were bound by specific lines, and not by the river, and therefore the grants are limited grants, and the land in dispute is outside of their boundary lines.

Concede that the Jarrot survey did not make the river the boundary, by specific call, yet its beginning was on the bank of the river, opposite St. Louis, and thence it followed the river to a point in it. Hilgard testified that this survey was on the old bank of the river. It is, then, evident that at this time,

which was some years prior to the Condaire survey, there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore, 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded *by* the river, or *on* the river, can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

A large number of cases have been cited by one of the counsel for the county, to establish that a grant is not carried to the centre of a stream, but stops at the bank, if the grantor describes the line as upon the margin, or at the edge or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river.

This may be good law, and not affect the right of the defendants. They do not claim the bed of the stream, and the proof shows that the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river or interfere with its free navigation and use by the public.

But the Condaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia Creek, but the land, if any, between their western line and the river. The Condaire survey run up the river and binding therewith, and *passed* the southwesterly corner of the Jarrot survey, No. 579, *at 6 poles*. Language could not make it more plain that the western line was bounded by the river, and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi, and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Counsel say at the time the locations were made there was no advantage of river front, no wharfage and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity and accepted the grants for the purpose of securing an approach to the river.

From the proof, before 1819 a ferry was established across the river near to the land in dispute, and has been since in constant operation. Before the grant of the swamp and overflowed lands to the State, in 1850, a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before the survey by the county of the swamp lands, in 1852, a charter for a railroad had been granted by the State, which resulted in the construction of the road from Terre Haute, in the State of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, as shown by the plat offered in evidence, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the father of waters. Their absolute necessity and consequent construction, as an outlet for our immense produce, had been known for more than a quarter of a century before their completion. Their usefulness will be greatly crippled, and the public thereby seriously suffer, if ready access to the river was denied.

It would be a strained construction to hold that in making these grants the United States reserved all accretions, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial, and not natural, means. It is not at all certain from the proof, that the accretions were entirely the result of artificial structures, or that they would not have been formed without them. The construction of coal dykes facilitated the formation, and the soil was prevented from washing away by the expenditure of money by the ferry company.

Jonathan Moore, who had known the river since 1813, testified that the accretions had commenced to form before the construction of the dykes, and McClintock and Jarrot testified to the same effect.

Concede, however, that the dykes, to some extent, caused the accretions; they were not constructed for such purpose, and appellants had nothing to do with their erection. They were built for the accommodation of the public and to secure an approach to the ferry-boats, and the city of St. Louis did some work to preserve its harbor. Improvements were also made by the United States to throw the channel of the river toward the city.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of appellants, cannot deprive them of a right to the newly-made soil.

Chancellor KENT, after declaring the common-law doctrine, that grants of land bounded on the margins of rivers, carry the exclusive right of the grantee to the centre of the stream, unless there is a clear intention to stop at the edge, says: "The proprietors of the adjoining banks have the right to use the land and water of the river, as regards the public, in any way not inconsistent with the easement; and neither the State nor any other individual has the right to divert the stream and render it less useful to the owners of the soil:" 3 Vol. Com. 427.

If portions of soil were added to real estate already possessed, by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures, which cause deposits between the old and new bank should not divest him of the use of the water. Otherwise, ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In Godfrey *v.* The City of Alton, 12 Ill. 29, the public landing had been enlarged and extended into the river, both by natural and artificial means, and this Court held that the accretions attached to and formed a part of the landing.

In New Orleans *v.* The United States, 10 Peters, 662, the quay had been enlarged by the levees constructed by the city to prevent the inundation of the water, and the Court held that this did not impair the rights of the city to the quay.

In Jones *v.* Soulard, *supra*, the intervening channel between the island and the Missouri shore had been filled up, in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor, and to prevent the channel from leaving the Missouri shore, threw rock into the river, and the coal dykes were made to afford access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions, then, are partly the result of natural causes and structures and work erected and performed for the good of the public. Appellants should not thereby lose their frontage

on the river and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

The judgment of the Circuit Court is reversed and the cause remanded.

State *v.* Buck, 15 S. Rep. 531; Griffin *v.* Kirk, 47 Ill. App. 258; Crandall *v.* Allen, 118 Mo. 403, 24 S. W. Rep. 172; Bouvier *v.* Stricklett, 59 N. W. Rep. 550, 40 Neb. 792; Cooley *v.* Golden, 117 Mo. 33, 23 S. W. Rep. 100; Gill *v.* Lydick, 59 N. W. Rep. 104, 40 Neb. 508; Winnepesaukee Camp-Meeting Assn. *v.* Gordon, 29 Atl. Rep. 412; Coulthard *v.* Stevens, 50 N. W. Rep. 983, 84 Iowa, 241; Nebraska *v.* Iowa, 143 U. S. 359; Nebraska *v.* Iowa, 145 U. S. 519.

d

Dereliction.

Where the water of a river or lake, whether navigable or otherwise, recedes slowly and imperceptibly, and the land before covered by water is left dry, such land belongs to the riparian owner from whose shore the water has so receded.

WARREN *v.* CHAMBERS.

Supreme Court of Arkansas, 1867.

25 Ark. 120.

COMPTON, J. This was a bill in chancery, exhibited by Samuel H. Warren against William E. Chambers, as administrator of Stephen Bonnell, deceased, for an abatement in the price of certain lands which Bonnell sold to the complainant.

At the final hearing the bill was dismissed, and the complainant appealed.

The ground on which an abatement of the purchase-money is sought, is that Bonnell has no title to a portion of the land embraced in his deed to the appellant. The land sold was bounded on Tucker's Lake, according to the original survey of the meanders of the lake, made by authority of the United States. Shortly before the sale to the appellant, the meanders of the lake were again surveyed, when it appeared that there

was a strip of land lying between Bonnell's land, as originally run, and the lake, which had become dry by recession of the water. This strip was conveyed with the other land, and is described in Bonnell's deed as "the swamp land recently surveyed." The evidence showed that the water receded gradually—continuing to do so through a series of years.

Waiving other questions that have been discussed, we will proceed to determine whether Bonnell had title to the strip of land above indicated; for, if he had, then this controversy is ended, and the decree of the Circuit Court below must be affirmed. The question presented involves an examination, to some extent, of the doctrines of alluvion and dereliction. Alluvion, according to the English common law, is an addition made to land by the washing of the sea, a navigable river, or other stream, where the increase is so gradual in its progress that it cannot be perceived how much is added in any moment of time. Land thus formed belongs to the proprietor of the adjacent land to which it is attached. Dereliction, according to the same authority, is a recession of the waters of the sea, a navigable river, or other stream, by which land that was before covered with water is left dry. In such case, if the alteration takes place suddenly and sensibly, the ownership remains according to former bounds; but if it is made gradually and imperceptibly, the derelict or dry land belongs to the riparian owner from whose shore or bank the water has so receded: Woolrych on Water-Courses, marg. pp. 29, 34, 35, 46, 47, and authorities there cited. And the reason, as given by Blackstone, why alluvial and derelict land, gained by imperceptible degrees, belongs to the owner of the adjoining land, is that *de minimis non curat lex*, and because such owners, being often losers by the breaking in of the water, or at charges to keep it out, this possible gain is a reciprocal consideration for such possible charge or loss: Bl. Com., vol. 2, 262.

In this country, these rules of the common law have been applied to lake as well as other waters. Thus, in Murry *v.* Sermon, 1 Hawks, 56, decided by the Supreme Court of North Carolina, the defendant in ejectment claimed title to the land

in dispute, which was bounded by Mattamuskeet Lake, under a patent dated in 1761; and the plaintiff claimed under a grant of recent date, covering lands between the defendant's lines and the lake. Both parties introduced evidence as to what had been actually run for the lines of the defendant's land; and the Court below instructed the jury to find for the defendant, no matter whether the lake had receded or not; for, in either case, it remained his boundary. This was held to be erroneous, and a new trial was awarded, in order that the jury might find the fact whether the waters of the lake had receded gradually and imperceptibly, or suddenly and sensibly, from the land in controversy, because, on *that* question, the Court said, the rights of the parties depended. So, in Banks *v.* Ogden, 2 Wall. 57, recently determined in the Supreme Court of the United States, it was held that accretion by alluvion from Lake Michigan belonged to the proprietor of the land bounded by the lake. It is true that, in both of these cases, lakes are navigable, and in the case before us, evidence was introduced in the Court below to prove that Tucker's Lake is navigable; but in such cases, it is immaterial whether the water is navigable or not. In England, from whence we derive the doctrine of alluvion and dereliction, and where it is said to be applicable to streams generally (Woolrych on Waters, marg. p. 56) no river is navigable, in a common-law sense, above the point where the tide ebbs and flows, though it may be so, in fact; and this rule has been adopted in most of the American States: Angell on Water-Courses, § 542, *et seq.*, and cases there cited. Whether a river is navigable, in a technical common-law sense, or in the ordinary acceptation of the term, or whether it is navigable or not, may become an important inquiry in cases touching the right of the public to use it as a highway, and for commercial purposes. So, a like inquiry would be pertinent in cases involving the ownership of the bed of the stream, as between the government, or those claiming under it, and the riparian proprietors; because, at common law, the bed of a river belongs to the government so high up only as it is navigable in a technical sense—that is, as

far as the tide ebbs and flows; and above that point it belongs to the riparian owners; each—where their lands lie on opposite sides of the river—owning to the middle or thread of the stream. But whether a river or other water is or is not navigable can in no way affect the right of the riparian proprietor to such additions as may be made by alluvion or dereliction. His right rests altogether on another and different foundation. The facts to be ascertained are the local situation of the land and the mode by which the increase has been added. If the land is contiguous to the water and the addition is made slowly and insensibly, his title to such addition is complete. In Municipality No. 2 *v.* Orleans Cotton Press, 18 La. Rep. 122, it was decided that the right to future alluvial formation was a vested right inherent in the property, and an essential attribute of it, resulting from natural law, in consequence of the local situation of the land to which it attaches; and that it was an accessory to the principal estate or land, which cities as well as individuals might acquire, *jure alluvionis*, as owner of the front or riparian proprietor; and that the right was founded in justice, arising from the risks to which the land was exposed, and from the burden of keeping up levees or embankments in front of the river to protect the estate. And in Banks *v.* Ogden, *supra*, the Supreme Court of the United States said: "The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled, by usage and by positive law. Almost all jurists and legislatures, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the continguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself."

The testimony in the record brings the case before us clearly within the rules of law to which we have referred. The conclusion, therefore, is that the appellant acquire title to the derelict land, under the conveyance from Bonnell; and that, consequently, the decree must be affirmed.

Islands.

A grant of lands without reservation, bounded by a non-navigable river, vests in the grantee the title to unsurveyed islands between the mainland and the centre of the stream.

CHANDOS *v.* MACK.

Supreme Court of Wisconsin, 1890.

77 Wis. 573.

COLE, C. J. There is no dispute about the facts in this case, but the counsel disagree as to the law arising upon those facts. The action is ejectment, brought by the plaintiff's intestate, who claimed to be the owner, as riparian proprietor, of an island in the Wisconsin River, a navigable stream. She held and owned under various mesne conveyances the title derived from the general government of lot 4 in section 17, township 22, range 6 east, which lots lie on the main west bank of the river, opposite to the island in controversy. She claimed that she was entitled to the possession of this island by virtue of the grant of the general government of lots 3 and 4 to those under whom she derived title, except as to certain rights which the defendants have under a deed that is mentioned in the evidence, but which does not affect any question in issue here.

The island lies near the west bank of the river, as we have said, opposite lots 3 and 4; is west of the main channel and west of the thread of the stream, and also west of the main navigable portion thereof. It is separated from the west bank of the river by a narrow channel or slough, which varies in width from 95 to 100 feet, and is separated from the east bank

of the river by a channel which varies in width from 320 to 700 feet. The channel between the island and the west bank of the river has not been used since the settlement of the country for purposes of navigation, except to run out lumber manufactured at the mills on the main land on the west bank. The portion of the river used for the purpose of navigation is the main channel east of the island. The island is about 1,250 feet in length, and varies in width from 70 to 300 feet; it is a rocky formation, covered with a thin, sandy soil, and was originally covered with timber, which has been removed. It lies up and down the river, nearly parallel with the thread of the stream. It is not overflowed in ordinary freshets, but is substantially submerged in extraordinary floods. The island contains between two and three acres of land. When the general government, by its agent, surveyed and platted lots 3 and 4, and the lands on either side of the river opposite the island, it made no survey or plat of the island or of any part of it; nor has the government ever surveyed and platted it, although the location of the island is marked upon the government plat of the survey of the lands opposite and adjacent thereto. The government many years since disposed of all its lands on the river opposite and adjacent to the island, and there is nothing which tends to show that the government intended to reserve the island as a part of the public domain. The island is referred to in the field-notes of the meandered line, but it was not surveyed, though its location is marked upon a plat of surveys, so the fact of its existence was not overlooked by the agents of the government when such surveys were made.

Now, the question in the case is, To whom does the island belong? Did it pass to the purchasers of lots 3 and 4 on the banks of the river opposite to it? The island lies between these lots and the middle of the river, and there is nothing to show, as we have said, that the government intended to reserve any right or interest in the island. As there was no such reservation, the presumption is that the government did include it and pass all title to it to the purchaser.

On the part of the plaintiff, it is insisted that the title did

pass to the purchaser of lots 3 and 4 on the west bank of the river. The position of the learned counsel is this: He says when the general government, by its agents, surveys a section of land lying partly in a navigable stream, which embraces islands of various sizes in such stream, subdivides the entire section into such lots and subdivisions as it sees fit, and leaves some such islands unsurveyed, and places the same in market, and disposes of all said lots and subdivisions so surveyed and platted; that then it has parted with its entire interest in the section to the purchasers, who, as riparian proprietors, take under their respective grants to the middle of the stream; that, under such circumstances, the presumption is that the government intended to make no reservation, but intended that all its title should pass by its grant, as in case of a private conveyance. It seems to us there is great force of reason and much good sense in this view of the law. In this State the settled rule is that a grant by an individual of land which is bounded on a navigable stream vests in the grantee the title in the bed of the river to the thread of the stream, subject to the public right of navigation. The cases in this Court where this doctrine has been laid down are numerous, but are so familiar to the profession that it is unnecessary to cite them. The precise question, however, here presented—whether the title of an unsurveyed island between the shore and the middle of the stream would pass to the purchaser—has not been directly decided; but we see no principle of law or good reason for holding that it would not so pass. The inference certainly is very strong, when the government leaves a small island in a navigable river, lying between the shore and the middle of the stream, unsurveyed, and sells all the surveyed islands and all the lands on both sides of the river, that it intends to abandon all right to such unsurveyed island and let it pass to the riparian owners of lands on the river as an incident to its grant. It seems formerly to have been the policy of the government to survey islands omitted from the general survey, and sell them, but, from a letter of the acting commissioner

of the general land office, which was introduced on the trial, it appears that this practice has been abandoned because it was found disadvantageous to the public interest, and applications for such surveys are no longer entertained. This item of evidence gives additional strength to the inference as to the effect of the grant itself from the government—that, where no right is reserved, the grant of lands on the bank of the river vests in the purchaser the title of any unsurveyed islands lying between the main land and the centre of the stream, since the government no longer desires to assert any interest to an island thus situated and omitted in the original survey.

"In the case of Middleton *v.* Pritchard, 4 Ill. 510, the Supreme Court of Illinois held that, when a government grant is made which does not reserve a right or interest that would ordinarily pass by the rules of law, and the government does no act which indicates an intention to make such reservation, the grant includes all that would pass by it if it were a private grant; and that, as the United States had not imposed any limitation upon its grant of the land in question, which was an island in the Mississippi River, separated from the adjoining land by a slough, the title of the riparian owners extended to the thread of the river and included the island:" Gould, Waters, § 69. So, "in Railroad Co. *v.* Schurmeir, 7 Wall. 272, the question was as to the title to an island in the Mississippi River, which, at the time of the survey, was a mere sand-bar, about 90 feet wide and 160 feet long, separated from the main land by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in making the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand-bar had been filled in and covered with valuable improvements, and the contest was between the owner of the adjoining fraction and a railroad company which claimed the bar under a new survey made by a United States surveyor and a Congressional grant of certain odd-numbered sections. It was held that the sand-bar was included in the first survey

as a part of the main-land:" Gould, Waters, § 77. See same case, Schurmeir *v.* St. P. & P. R. R. Co., 10 Minn. 82.

It seems to us that the decision in the last case is decisive of the one before us. It is true, as observed by plaintiff's counsel, there are facts in the case at bar much stronger in favor of the plaintiff than in the Schurmeir case. The general government had actually conveyed the island in controversy there, and attempted to grant it to the State of Minnesota for certain purposes, and the defendant claimed under the State. But in the case before us, there is no pretense that the government has ever surveyed or attempted to convey this island as a lot separate from the survey and conveyance of lots 3 and 4 on the adjacent main shore, or that it has ever claimed, or now claims, to be the owner of the island, nor is there any pretense that the patent of the general government, issued on the sale of those lands, reserved any right or interest that would ordinarily pass, by the rules of law, to the patentee, or that it did any act indicating an intention to make a reservation. The quantity of land included in the island was never ascertained or attempted to be sold, and we think it must be deemed to have been included in lots 3 and 4, and to belong to the riparian owner of those lots.

This view renders it unnecessary to consider the question whether the plaintiff acquired any title from the State by virtue of the patents offered in evidence.

By the Court: The judgment of the Circuit Court is affirmed.

Chandos *v.* Mack, 10 L. R. Ann. 207. See note.

Riparian rights of cities: Sweeney *v.* Shakespeare, Mayor, *et al.*, 34 Am. and Eng. Corp. Cases, 139; note.

The *thread of the river* is the middle line between the two shores: Trustees of Hopkins Academy *v.* Dickinson, 9 Cush. 552.

e

Title by Abandonment.

***Incorporeal hereditaments* may be lost by abandonment, but one cannot divest himself of the legal title to land by abandoning the same.**

SCHOOL DISTRICT *v.* BENSON.

Supreme Judicial Court of Maine, 1850.

31 Me. 381.

The school district occupied certain land adversely to the owner for more than twenty years, by erecting upon it a woodshed. The former owner informed the school agent that the woodshed was on his land, and requested its removal, and the agent, supposing the district had no title to the land, removed it, and the district paid the necessary expenses thereby incurred. Afterward the district issues a writ of entry and contends that, having acquired title by adverse possession, it was unable to divest itself thereof by parol.

WELLS, J. The jury were instructed that if, in 1847, the agent of the school district, at the request of the defendants, removed said wood-house where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive, and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse, and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseisin, and the acts which they describe will have that

effect if not controlled or explained by other testimony: Little *v.* Libby, 2 Greenl. 242; The Proprietors of Kennebec Purchase *v.* John Springer, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseisin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same, is barred by limitaton: Stat., c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseisin or by deed, it vests the fee simple although the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseisin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive, and adverse possession for twenty years would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

No doubt a disseisor may abandon the land, or surrender his possession by parol, to the disseisee, at any time before his disseisin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed;

but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will: Stat., c. 91, § 30.

The exceptions are sustained and a new trial granted.

3 Wash. R. P. 67.

Some Courts have held that abandonment of land acquired by possession is conclusive proof that the former holding was not adverse: Vickery *v.* Benson, 26 Ga. 589; Church *v.* Burghardt, 8 Pick. 327.

Easements may be lost by abandonment: Dyer *v.* Sanford, 9 Met. 395–402; Hatch *v.* Dwight, 17 Mass. 289.

Equitable estates may be so lost.

See further: Bausman *v.* Kelley, 38 Minn. 204; Gregg *v.* Blackmore, 10 Watts, 192.

f

Estoppel.

Title to land may be acquired: (1) By estoppel in deed; (2) By estoppel *in pais*.

Deed.

Where a grantor conveys land, *with covenant of warranty*, to which he has no title at the time, and afterward acquires title thereto, it vests *eo instanti* in the former grantee.

PIKE *v.* GALVIN.

Supreme Judicial Court of Maine, 1848.

29 Me. 183.

SHEPLEY, J. The title of both parties to the demanded premises is derived from Artemas Ward, who, by his agent Robbins, made a contract in writing, on October 26, 1820, to convey a tract of land including the premises to Theodore Jellison upon the performance of certain conditions therein stated. Jellison appears to have entered into possession, but does not appear to have performed the conditions. On July 7, 1823, Jellison assigned that contract to the demandant, and on the same day made a deed of release purporting to convey the same tract of land to the demandant. Artemas Ward on

October 27, 1825, by a deed containing covenants of warranty, conveyed a larger tract of land including the tract before named, to Jones Dyer, Jr., who, on July 11, 1829, conveyed to Theodore Jellison the tract of land described in his deed to the demandant. Jellison, on May 9, 1833, conveyed the premises demanded to Stephen Emerson. These conveyances were all duly recorded. The defendant is the tenant of Joseph Wyeth and Stephen G. Bass, who have exhibited a title derived from Stephen Emerson. The demandant has never been in possession of the land described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison have always been in possession.

As Jellison had no title when he made his deed on July 7, 1823, the demandant can have none, unless that acquired by Jellison on July 11, 1829, inured to him.

The deed from Jellison to the demandant contains no covenants but the following, "so that neither I, the said Jellison, nor my heirs, or any other person or persons claiming from or under me or them, or in the name, right, or stead of me or them, shall or will by any way or means have, claim, or demand any right or title to the aforesaid premises or to any part or parcel thereof forever."

Without entering upon a discussion of the doctrine or the different aspects of it presented in the very numerous cases, which have been decided respecting the effect of covenants contained in a conveyance of land, to transfer to the vendee by inurement, estoppel, or otherwise, a title subsequently acquired, it will be sufficient for the present purpose, to state a couple of positions, which appear to have been asserted or admitted in many of them.

1. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it.

Such is the doctrine in this State: White *v.* Erskine, 1 Fairf. 306; Lawry *v.* Williams, 13 Maine R. 281; Baxter *v.* Bradbury, 20 Maine R. 260.

In New Hampshire: Kimball *v.* Blaisdell, 5 N. H. R. 533.

In Vermont: Middlebury College *v.* Cheney, 1 Vermont R. 336.

In Massachusetts: Somes *v.* Skinner, 3 Pick. 32; White *v.* Patten, 24 Pick. 324.

In New York: Jackson *v.* Matsdorf, 11 Johns. R. 91; Jackson *v.* Bradford, 4 Wend. 619; Pelletreau *v.* Jackson, 11 Wend. 110.

In Ohio: Hill *v.* West, 8 Ham. 222.

In the Courts of the United States: Terrett *v.* Taylor, 9 Cranch, 23; Mason *v.* Muncaster, 9 Wheat. 455; Stoddard *v.* Gibbs, 1 Sum. 263.

Against these and other decisions to the same effect it has been contended, that "the old common-law warranty has no practical operation under the system of conveyancing employed in this country, except in the single case of release with warranty, to a party in adverse seisin of an estate, and of a subsequent descent of the right of entry or action to the warrantor." And that "the doctrine of estoppel in deeds cannot be based upon that of warranty:" Doe *v.* Oliver, Smith's L. C. 460, in note. If the question could be considered as open to discussion, it might be worthy of deliberate consideration. But it would seem to be too late to entertain it.

2. Where one has made a conveyance of land by deed containing no covenant of warranty, an after-acquired title will not inure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

There is an irreconcilable difference in the decided cases respecting this proposition. It is believed, however, to be fully established by the better considered opinions; and to be in accordance with well-established principles.

It is sustained in this State by the cases of Allen *v.* Sayward, 5 Greenl. 227, and Ham *v.* Ham, 14 Maine R. 351, and opposed by the case of Fairbanks *v.* Williamson, 7 Greenl. 96.

In New Hampshire it is sustained by the case of Kimball *v.* Blaisdell, 5 N. H. R. 533.

In Massachusetts it is sustained by the cases of Somes *v.* Skinner, 3 Pick. 61; Blanchard *v.* Brooks, 12 Pick. 47; Comstock *v.* Smith, 13 Pick. 116, and opposed by the case of Trull *v.* Eastman, 3 Metc. 121.

In Connecticut it is sustained by the case of Dart *v.* Dart, 7 Conn. R. 250.

In New York it is sustained by the cases of Jackson *v.* Wright, 14 Johns. R. 193; Jackson *v.* Bradford, 4 Wend. 619; Pelletreau *v.* Jackson, 11 Wend. 110; Jackson *v.* Waldron, 13 Wend. 178. And it may be considered as opposed by the cases of Jackson *v.* Bull, 1 John. Cas. 81, and Jackson *v.* Murray, 12 Johns. 201. If they be so considered, they were overruled by the case of Pelletreau *v.* Jackson.

In Ohio it is sustained by the case of Kinsman *v.* Loomis, 11 Ohio, 475.

The only suitable inquiry to be entertained in this State is, whether our own case of Fairbanks *v.* Williamson, although the doctrine asserted in it may have been approved elsewhere, as well as in the case of White *v.* Erskine, can upon sound principles be sustained. The deed in that case contained no covenant but that of *non-claim.* The ground upon which it was decided, that a title subsequently acquired inured to the vendee, appears to have been, that the covenant of non-claim was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto."

Covenants, which relate to the land, are said to run with the land: Sale *v.* Kitchingham, 10 Mod. 158; Norman *v.* Wells, 17 Wend. 136. But a covenant which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance: Spencer's Case, 5 Coke, 17 b; Lucy *v.* Levingston, 2 Lev. 26; Lewes *v.* Ridge, Cro. Eliz. 863; Bickford *v.* Page, 2 Mass. 460; Slater *v.* Rawson, 1 Metc. 456; White *v.* Whitney, 3 Metc. 81; Clark *v.* Swift, 3 Metc. 390; Chase *v.* Weston, 12 N. H. 413; Garfield *v.* Williams, 2 Verm. 327; Beardsley *v.* Knight, 4 Verm. 471; Mitchell *v.* Warner, 5 Conn. 497; Kane *v.* Sanger, 14 Johns.

89; Beddoe *v.* Wadsworth, 21 Wend. 120; Garrison *v.* Sandford, 7 Halst. 261; Randolph *v.* Kinney, 3 Rand. 394; Backus *v.* McCoy, 3 Ham. 211; Allen *v.* Wooley, 1 Blackf. 149. The cases of Kingdom *v.* Nottle, 1 M. & S. 353, and 4 M. & S. 53, are denied to have been correctly decided in Mitchell *v.* Warner, 5 Conn. 497, and in Clark *v.* Swift, 3 Metc. 390. Kent, also in speaking of covenants, which run with the land says, "they cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate:" 4 Kent's Com. 472, note b.

Admitting the covenant in the deed, alluded to in Fairbanks *v.* Williamson to be a covenant that might run with the land, it could not run or be transferred by law, to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one, who has in such a solemn manner admitted a matter to be true, to allege it to be false. "This," says Kent, "is the reason and foundation of the doctrine of estoppels:" 4 Kent's Com. 261, note d; where he also says, "a release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise." The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct.

One, who acquires no title by a release without covenants respecting the title, cannot recover back the purchase-money which he paid for it: Emerson *v.* The County of Washington, 9 Greenl. 88. To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in

another and less direct mode property of more value than the purchase-money.

The conclusion is that the doctrine asserted in the case of Fairbanks *v.* Williamson cannot, upon sound principles be admitted, and that the decided cases in this and other States are opposed to it.

When Jellison made his deed of release to the demandant, he was in possession in submission to the title of Ward, and was but a tenant at will to him. Not being seised of a fee simple he could not convey it. The demandant must have known, when he received that deed, that Jellison had no title and could convey none, for he, at the same time, took an assignment of Jellison's contract, to purchase that land of Ward. He subsequently acted as an appraiser to make a levy and to pass the title to a part of that land, from a grantee of Jellison to a creditor of that grantee. There is no allegation in the deed of Jellison to the demandant respecting the title, which it would be necessary for Jellison or his grantee to deny or contradict by setting up a title subsequently acquired.

Demandant non-suit.

Tefft *v.* Munson, 57 N. Y. 97; White *v.* Patten, 24 Pick. 324; Knight *v.* Thayer, 125 Mass. 25; Huzzey *v.* Heffernan, 143 Mass. 232; Gregory *v.* Peoples, 80 Va. 355; Robinson *v.* Douthit, 64 Tex. 101; Carson *v.* New Bellevue Cem. Co., 104 Pa. St. 575; Perkins *v.* Coleman, 90 Ky. 611; Edwards *v.* Hillier, 13 S. Rep. 692; 70 Miss. 803; Morris *v.* Jansen, 58 N. W. Rep. 365; Duchess of Kingston's Case, 3 Smith L. C. 2107.

Such title vests in the grantee without his consent: Baxter *v.* Bradbury, 20 Me. 260-3.

So where a deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire.

PENDILL *v.* AGRICULTURAL SOCIETY.

Supreme Court of Michigan, 1893.

95 Mich. 491.

HOOKER, C. J. Plaintiffs brought ejectment, claiming title in fee to the premises described in their declaration, and proved

a perfect title from the federal government. The defenses made are:

1. That plaintiffs are estopped from asserting their title against defendant.

2. That defendant has acquired title by adverse possession.

The ancestor of plaintiff Pendill, one James P. Pendill, was the owner of a tax title covering the land in controversy, upon which an auditor-general's deed had issued to him. After his death plaintiff Pendill and the other heirs and the widow of the decedent joined in a partition deed reading as follows, viz.:

"This indenture, made . . . between Frank Pendill [and the other heirs], who are the sons and heirs-at-law of James P. Pendill, deceased, . . . witnesseth:

"That the said parties, as such heirs-at-law and widow, have by amicable arrangement divided among themselves the property of said estate. . . .

"Now, therefore, in order to carry into effect the said agreement and division, the said parties, in consideration of the sum of one dollar to each in hand paid, the receipt whereof is hereby confessed and acknowledged, have granted, sold, and conveyed all their right, title, and interest in and to the following described land (here follow descriptions of land conveyed to the several parties).

"To have and to hold to each of said grantees the lands above described, as conveyed and set off to them in severalty, and to their heirs and assigns forever."

It is defendant's theory that, under this partition deed, any title to the premises subsequently acquired by Frank P. Pendill inured to the benefit of the grantee named in that deed, James Pendill, and through him to defendant. In the case of Jackson *v.* Waldron, 13 Wend, 178, it is said that—

"The principle of an estoppel, as applicable to deeds, is to 'prevent circuity of action, and to compel parties to perform their contracts.' Thus, a party asserting in a deed the existence of a particular fact, and thereby inducing another to

contract with him, cannot by a denial of that fact compel the other party to seek redress against his bad faith by suit."

This doctrine is well supported. So, where the deed imports to convey a fee, though it lack a covenant of warranty, the doctrine of estoppel permits the grantee to have the benefit of such titles as the grantor may subsequently acquire.

In the case of Van Rensselaer *v.* Kearney, 11 How. 325, it it is said by Mr. Justice NELSON that—

"The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterward denying that he was so seised and possessed at the time he made the conveyance."

We may then inquire whether the partition deed relied on carries on its face, by way of recital or averment, the statement that the grantors or their ancestor was seised of a title in fee in the premises, either in express terms or by necessary implication. After naming the parties, the deed recites the fact that they "have by amicable arrangement divided among themselves the property of the estate." The consideration is "one dollar to each," for which they "have granted, sold, and conveyed all their right, title, and interest" in the land mentioned. If there is an assertion of any particular interest or title, either express or by necessary implication, it is limited to that belonging to the estate, of which it may be presumed that all were equally cognizant. We see no opportunity for the application of the doctrine of estoppel to this case.

The question of adverse possession remains. Defendant purchased the premises from James Pendill, to whom this tax title was conveyed by the partition deed. Defendant claimed that it and its grantors had been in possession, claiming under

this tax deed, for upwards of ten years before this action was brought. The Court instructed the jury that the evidence established such claim, and directed a verdict for defendant. The question, then, is, was the Court justified in holding, as a matter of law, that the facts shown constituted adverse possession, instead of submitting the question to the jury?

In the case of Yelverton *v.* Steele, 40 Mich. 541, Mr. Justice GRAVES, in stating the law upon the subject of adverse possession, said: "The doctrine which sanctions the divestiture of the true owner by hostile occupancy is to be taken strictly, and the case is not to be made out by inference, but by clear and cogent proof"—supporting his opinion by numerous authorities. He quotes with approval the language of Mr. Justice DUNCAN where he says that "it must be an actual, continued, visible, notorious, distinct, and hostile possession." While it would have been the duty of the Court to direct a verdict for the plaintiffs in case of the absence of clear and cogent proof upon any one of these six requisites, he could not properly direct a verdict for the defendant unless each and every one of them was established by such proof, uncontroverted; for, the moment that any evidence fairly tending to disprove one of them was given, a question of fact for the jury arose, whether it was shown by plaintiffs or appeared from the examination of defendant's witnesses.

The partition deed was executed August 3, 1885, at which time James Pendill succeeded to the tax title of his ancestor. He was called upon rebuttal, and testified as follows:

"*Q.* You made your contract with Maynard in the summer of 1886—July or June, 1886. What do you say with respect to your drawing rent, or there being anybody in occupation of the property, up to that time?

"*A.* I am certain it ceased before that time."

On cross-examination the same witness was questioned and answered as follows:

"*Q.* The slaughter-house he [meaning the ancestor] had there was occupied by him, was it not, up to the time of his death?

"*A.* Not all the time, sir.

"*Q.* I mean he had something there, he kept something there, and looked after it.

"*A.* I don't think—not at that time—he had anything there before it burned.

"*Q.* I mean up as long as he lived. Didn't he have some tools?

"*A.* I don't believe anything was ever kept there for some time. We had no use for it.

"*Q.* He still retained charge of it, and looked after the property, I suppose, did he not?

"*A.* In what way?

"*Q.* Well, looked after it to see there was no trespasses committed on it.

"*A.* I don't believe he had been there for some years.

"*Q.* Don't you think he was out there the season before he died?

"*A.* No, sir; I don't think he had any occasion to go there.

"*Q.* He had tenants living in the house?

"*A.* I don't think he did at that time.

"*Q.* Do you know about it?

"*A.* Well, I can't state positively just when they came and went, but I know the house was vacant a large part of the time."

Again, the witness Prentice, who went in 1881 to look at the old house with a view to using it as a pest-house, says that he found the house unoccupied, windows out, the doors down, and the floor about used up.

All this was evidence bearing on the question of whether there was actual or visible or notorious or continued occupancy; and though the Court may perhaps properly have felt that the great preponderance of evidence showed the possession claimed, in which opinion the jurors might have concurred, it was their province to deal with the question, which could not properly be taken from them. We see no

alternative but to reverse the judgment, with costs, and award a new trial.

Ordered accordingly.

Van Rensselaer *v.* Kearney, 11 How. 325; Bush *v.* Cooper's Add., 18 How. 82; Carver *v.* Astor, 4 Pet. 1–84.

Sheriff's Sale.

After-acquired title does not inure to a purchaser at a sheriff's sale, as the creditor in such case makes neither a warranty nor its equivalent.

HENDERSON *v.* OVERTON.

Supreme Court of Tennessee, 1830.

2 Yerger, 394.

CATRON, J. In 1798, Overton caused an attachment to issue against the estate of David Allison, which was levied upon land. At this stage of the proceeding Allison died. A *sci. fa.* was run to bring in William Blount as executor of Allison. Blount made no defense, and judgment was rendered against him by default, and Overton recovered against him the sum claimed. At the next term an order was made by the Sumner County Court, where the proceedings were had, that a *sci. fa.* should issue against the heirs of David Allison, to show cause why judgment should not be entered up against them for the amount recovered by the judgment against the executor. No heirs were named in the writ. This, and a succeeding *sci. fa.*, were returned "not found." A judgment was then rendered against the heirs of David Allison "*according to sci. fa.*" Various executions issued upon this judgment; the first in 1801, and levies and sales were made by virtue thereof.

In the fall of 1819, Overton caused an execution to be delivered to the sheriff of Stuart County, grounded upon this judgment, and caused it to be levied upon a tract of land of one thousand acres, lying within said county. The land was advertised and sold to complainants for $240, and a deed was made to them in the usual form by the sheriff.

In 1822 a compromise took place between Overton, Andrew Jackson, and others, in reference to claims Jackson and Overton had against the estate of David Allison, and the one thousand acre tract of land was by Jackson conveyed to Overton. Upon this title Overton brought ejectment against the complainants and obtained a verdict and judgment for the land. To enjoin this, the bill was filed and an injunction awarded to stay the execution of the writ of possession, which was made perpetual by decree on the final hearing before the chancellor, from which there was an appeal prosecuted to this Court.

It is contended for complainants that Overton having induced them to purchase at the sheriff's sale, is estopped to set up his subsequently acquired deed.

Overton, neither by himself, or through his agent, made any representations to complainants as to the state of the title. The facts seem to be, that Samuel R. Overton, a relation of defendant, transacted the business, and that his object was to buy in the lands of Allison's heirs, at a great sacrifice, upon speculation; that the complainants attended the sale, and bid from similar motives, each risking the title, acting in opposition to each other, and being unacquainted.

Where one man stands by and knowingly permits another to purchase and expend money on land, under an erroneous opinion of title, without making his claim known, he shall not afterward be permitted to exercise his legal right against such deceived purchaser: 2 Atk. 86; 1 Eq. Ca. Ab. 356; Prec. in Ch. 37; 2 Ver. 150; 3 Atk. 692; 5 Ves. 688; 7 Ves. 230; 1 Johns. Ch. R. 344, 354.

Overton had no title at the time of the sheriff's sale, and was endeavoring to obtain it, for which purpose his agent bid up the land to nearly the price of complainant's bid. It is impossible to apply the principle to Overton. To a party situated as Jackson was, alone can the doctrine be made to apply, and in reference to him even it would be inapplicable. Any man's title could be defeated if a purchaser at execution sale could say to the legal owner, ignorant or conusant of the pre-

tended purchase, "You passively stood by and permitted me to be deceived." *Caveat emptor* is the undoubted rule in relation to *titles* in cases of execution sales of land; there is no warranty of title, either express or implied, by any one: 1 Ten. R. 286; 4 Hayw. R. 179; 2 Bay's Rep. 171; 2 Murphy's N. C. Rep. 291; 1 Devereux & Badger's R. 39; 2 Bibb's R. 95; Martin's R. 575, 615.

It is next contended the rule applies to Overton, "that where A. sells land to B., and executes a conveyance purporting to be in fee with warranty of title, when A. has no estate, but afterward has conveyed to him the fee, the benefit of this conveyance shall inure to B. the purchaser: 1 Inst., §§ 446, 265, a and b; Litt., § 476; 10 Viner's Ab. 483; 1 Salk. 275, 6; 2 Salk. 685; 4 Com. D. Estoppel A. 2; 1 Johns. Ca. 90; 4 Johns. R. 194; 12 Johns. R. 201; 13 Johns. R. 316.

The Courts of New York seem to treat this as an estoppel, proceeding upon the ground that the grantor is not permitted to gainsay his own deed by alleging he had no title at the time he conveyed. All estoppels proceed upon this, that in the nature of evidence, some is of too high a grade to be denied. A fact admitted by recital, or directly in a covenant or deed, concludes all the parties to it, and cannot be averred against: Com. D. Estoppel, A. 2.

We doubt whether this be the true reason, however, why, if A. conveys to B., with warranty of title when he had none, and afterward by conveyance acquires the fee from C., the benefit of the latter deed shall inure to B. Coke gives the better reason in his commentary on the 265th section of Littleton. When speaking of the release, he says: "If there is a warranty of title in the deed from A. to B., by force of which were B. evicted, he could recover from A. in damages to the value of the land, then A. and his heirs would be rebutted and barred of any remedy by action upon the newly acquired deed. And this, to *avoid circuity of action*, which is not favored in law."

But if there was no warranty of title to sustain the action of covenant upon eviction, the action of A. upon the newly

acquired title would not be barred: Litt., § 265; 14 Johns. R. 194. We have seen a sheriff's deed is a conveyance of the debtor's *legal* title, without warranty express or implied on the part of the debtor, creditor, or sheriff; therefore this incident of *express* warranty does not apply to it in law: 4 Hay. 179; 2 Bay's R. 171; 2 Com. Rep. 188. Had Overton made a deed similar in effect, say a release void in law to complainants, he would not have been barred to set up and prosecute an ejectment upon the deed subsequently obtained from Jackson. Neither could he have been restrained in equity. We take it to be a settled rule, unless there has been fraud in the transaction, that where the grantee takes no covenant for title, he is without remedy at law or in equity. Mr. Sugden has brought together the authorities in his treatise on Vendors, 346, 7, 3d ed.; as has Judge KENT: 2 Cain's R. 188; 3 Ves. R. 235.

As an assurance of title, a sheriff's deed stands lower than any other, and equity can afford no relief: 4 Hay. 179; 2 Bay, 170; 2 Murphy, N. C. R. 291.

Equity follows the law. Where there is no legal liability, equity can create none: Head *v.* Stamford, 3 P. Wms. 409. It follows that a contract imposing no legal obligation can be enforced nowhere: Rutherford *v.* Wheaton, Nashville, 1830.

No legal liability was imposed upon Overton by the sheriff's deed to protect the title of complainants, express or implied. They purchased such title as Allison's heirs had, running all risks of its validity: 2 Bay's Rep. 171. The heirs had no title, the deed operated nothing, is void in law, and equity cannot help it; to do so, would be affording protection to a mere nullity, which cannot be done at law or in equity: Litt. 265 a; 2 Bibb's Rep. 95.

This position is undeniable, and covers the whole case so far as protection is sought against the ejectment.

To decree a perpetual injunction in this cause would, in substance, be a decree of specific performance. The complainants paid something like one-tenth of the value of this land; and to decree it to them, would in effect be, in that proportion, a

greater fraud upon the owner than he would commit upon them by retaining their money. Neither the one or the other can be tolerated in a Court of Equity; the greater principle governing which is equality: Fran. Maxm. 3.

It has been contended for the defendant, and admitted to be true by complainants' counsel, "that if the land cannot be obtained by perpetual injunction, the purchase-money cannot be decreed to complainants." This is certainly true, in reference to the purchase of a defective *title*, because as to the *title*, the rule *caveat emptor* applies; but it is just as untrue in reference to the *void judgment* of the execution creditor. Suppose Overton had obtained from the clerk of some Court, other than Sumner, an execution not authorized by any judgment, the writ had been fair on its face; the sheriff had levied it, and obtained $240, by virtue thereof, from complainants, which sum he had paid over to Overton. Will any one doubt that it could not have been recovered from him, because obtained by a false token? How does the present case differ from the one supposed? In no wise, other than there was an appearance of a judgment upon the records of the Sumner County Court, which exempted the clerk and the plaintiff in the action from the charge of fraud for issuing the execution. 1. No plea of fully administered was found for the executor. 2. The heirs were not named in the writ of *scire facias*, or their names returned by the sheriff. 3. They were not served or the fact of non-residence returned. For these and other reasons the proceedings are void: Roberts *v.* Busby and Wife, 3 Hay. Rep. 299; Sewell and Jones *v.* Williams, 5 Hay. Rep. 280. Same case in this Court in manuscript: Boyd *v.* Armstrong, and Peck *v.* Wheaton.

If A. obtains money from B., without consideration, either through fraud or mistake, B. can recover it back: Bul. N. P. 131; Esp. N. P. 2 to 6; 6 Term Rep. 606. In such cases the action of assumpsit was substituted for a bill in equity, as late as the days of Lord MANSFIELD. The defendant having answered and come to a hearing, cannot then object to the jurisdiction of a Court of Equity when the matter is doubtful: 2 Johns.

C. C. 369 ; 4 Johns. C. C. 290. Courts of Equity in this State have assumed jurisdiction and afforded relief in similar cases: Robertson *v.* England at Sparta, Ward and Others *v.* Southerland and M'Campbell, Peck's Rep. Appendix. In these cases an execution on a void judgment had been put into the hands of the sheriff of White, and money obtained upon it; the only question the Court laid stress upon was, is the judgment void? Judge HAYWOOD thought where the judgment had been obtained in the lifetime of the ancester, the creditor could reach the lands descended, without any administrator being appointed, but felt himself bound by the case of Boyd *v.* Armstrong, decided otherwise by a majority of the Supreme Court.

Overton will refund to complainants $240, with interest thereon from the 6th day of November, 1819.

It is said defendant did not receive from the sheriff the whole amount. It is his misfortune; had he let his void judgment rest, it would not have happened. The whole proceeding on the execution being void, the sheriff will be authorized to pay the overplus to the defendant; and the decree will order that he may apply and receive it.

The decree below is entirely reversed; therefore, the complainants will pay the costs of the cause in this Court, and the defendant of the Court below.

The bill, so far as it enjoins the action of ejectment, will be dismissed.

Decree accordingly.

Willis *v.* Watson, 5 Ill. 64; King *v.* Gilson's Admx., 32 Ill. 353.

In Pais.

SUMNER *v.* SEATON.

Court of Chancery, New Jersey, 1890.

47 N. J. Eq. 103; 19 Atl. Rep. 884.

One Mrs. Smith and defendant owned lands in severalty which met in the centre of a street. The city so changed the line of the street that a narrow strip of defendant's land, formerly in the street, was left on the opposite

side and adjoining Mrs. Smith's lots. Afterward Mrs. Smith conveyed her land to the claimant in this suit, who erected a valuable dwelling on the same, honestly supposing that she procured title to all the land as far as the street. She graded the grounds, including the strip, sodded the same, planted trees and shrubbery along the line of the street on the strip, and also erected thereon an iron fence, and otherwise beautified and adorned it. Defendant's deed was on record, and he stood by, seeing all these improvements, but did not assert his title until all the improvements were made, when he brought an action in ejectment, and this claimant commenced this suit in equity to enjoin him from proceeding further in that action.

PITNEY, V. C. Complainant rested her right to relief on three grounds: First, that the effect of the proceedings to change the location of the street was to vest in her the absolute legal title to the strip in question; second, that if the effect was not to change the title at law, it did in equity; and, third, that the defendant is estopped by his silence and acquiescence, while complainant was making her improvements, from setting up his title as against her.

As to the first point. Should the complainant satisfy the Court that it is well taken, the result would be simply to oust the jurisdiction of the Court, for the simple reason that the ground is available at law as a defense to an action of ejectment. The proceeding here is and must be on the basis that the legal title is in the defendant; and as there has been a general verdict rendered by a Judge without a jury, in favor of the defendant herein, and judgment entered thereon, it must have been upon a finding that the legal title is in him.

The second point presents a more serious question. Mrs. Smith owned a lot with 500 feet of frontage on a street in the city of Elizabeth. As so situated, it was admitted that it had great value. The City Council changed the location of the street in front of it in such a manner as to cut off access from this lot to the street by interposing in front of it land belonging to a third party. That such a change must result in a serious injury to the value of the lot is obvious; yet not only were no damages awarded to Mrs. Smith, but a commission actually assessed a large sum against her for benefits conferred upon her lot, and when the feature in question was called to the

attention of the municipal authorities they refused to abate it. Complainant urges, and I think rightly, that the action of the commission and the Common Council can be accounted for, consistently with the least intention on their part to act fairly and justly toward Mrs. Smith, only on the ground that they supposed that the effect of the proceeding was to vest in her the beneficial use of the intervening strip. It is impossible to suppose that five gentlemen, chosen on account of their intelligence, good judgment, and honesty, would make such an award on any other basis, or that an impartial city council would confirm it. These officials cannot be supposed to have been ignorant of the true situation of the property lines, for not only was their attention called to it by the written protest of Mr. Smith, but the map shows it most clearly. For these reasons I think it must be assumed that the whole proceedings, as well the ascertainment of damages as the assessment on account of benefits, must have proceeded on the basis or assumption that the strip in question would become the property of Mrs. Smith. The effect of this assumption is obvious. The sum total or aggregate of the cost of improvement was reduced by the amount which the city would have been obliged to pay, if anything, to Mrs. Smith for damages to her lot caused by cutting it off from the street; and the amount to be assessed against the other lots, not situated in this respect the same as hers, was reduced by the amount actually assessed against her lot, and paid by her. Presumably, then, every other person liable to assessment derived a direct pecuniary benefit from the assumption in question; and there is, to my mind, great force in the argument that all the land-owners who participated in the fruits of this assumption became parties, so to speak, to the arrangement, and are estopped from setting up the contrary of the assumption upon which it was based, and from which they received a direct benefit.

But the defendant was not mentioned in the assessment on account of benefits, and it was not proved that he had anything to do with it, or that he made any individual arrangement with the Common Council on the assumption before

mentioned. It is not shown that he knew anything of it, or of the commissioners' last assessment. And I do not at this moment perceive how the Court can presume anything against him in this respect. But counsel for the complainant relies in this connection upon the release executed by the defendant, as above set forth. He argues that it must be read and construed in the light of the actual facts and features of the scheme of improvement, one of which, by the maps and assessments, appeared to be that whatever land the north-side owners might own south of the south line of the new street should go to the owners on that side, and that such features clearly appeared by the inspection of the map on file in the proper department of the municipal government; and he argues that the land so, in effect, attempted to be transferred from the defendant to the complainant's grantor, is fairly included in and covered by the language of the release, as "land and real estate taken and appropriated by the city for the straightening of Rahway Avenue." In this connection it is important to observe that the payment was made to defendant, and the release in question executed by him in July, 1875, long after the strip in question had been fenced in and inclosed by complainant's grantor, and her improvements in part made, so that defendant, when he executed the release and accepted the money, must have known by observation just what the effect of the improvement was, and that the complainant supposed that she owned this land, and was acting on that supposition. The power of a municipal corporation, in the absence of objection, to acquire land and transfer it to a natural person as a part of a scheme of legitimate improvement, is sustained by judicial decision: Embury *v.* Conner, 3 N. Y. 511; Sherman *v.* McKeon, 38 N. Y. 266.

But I have not found it necessary to determine definitely whether, upon the second ground alone, complainant is entitled to succeed in this Court. This part of the case, however, has, in my judgment, an important bearing on complainant's third position; since I think the circumstances referred to fully justified Mrs. Smith and her daughter, the

complainant, in supposing and believing that the effect of the improvement was to give her the beneficial title to the strip in question, and that she and her assignee, the complainant, acted in good faith on that assumption. In answer to this inference, defendant contended that the protest of Mrs. Smith's husband, above set forth, shows that she had notice of the fact that defendant had the legal title to the land in dispute. But on that point it is to be observed—First, that the land here in dispute was marked on the map as belonging to Wetmore, who was a party, so to speak, to the assessment, and bound thereby; second, that Mrs. Smith's son, who prepared the protest, swears that his mother knew nothing of it; third, that he concluded, upon consideration, that the effect of the proceeding was to vest the beneficial title in the strip in his mother, and so paid the assessment without further question; fourth, that the complainant is not chargeable with knowledge of the protest, and she and her husband deny all notice of any defect of title.

This brings us to the third ground, namely, estoppel by acquiescence and silence. Here complainant relies upon the familiar maxim that where a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent; or, as it is otherwise expressed, *qui tacet, consentire videtur; qui potest et debet vetare jubet si non vetat.* In Wendell *v.* Van Rensselaer, 1 Johns. Ch. 344, Chancellor KENT, at page 354, says: "There is no principle better established in this Court, nor one founded on more solid foundations of equity and public utility, than that which declares that if one man knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel." This doctrine was approved by Chancellor PENNINGTON in Ross *v.* Railroad Co., 2 N. J. Eq. 422, at page 434; by the Court of

Appeals in Doughty *v.* Doughty, 7 N. J. Eq. 643, at page 650; and has since been recognized in many cases in this Court, and was acted upon by Chief Justice BEASLEY, sitting for the Chancellor, in Erie Ry. Co. *v.* Delaware, L. & W. R. R. Co., 21 N. J. Eq. 283, at page 288 *et seq.*, and by Vice-Chancellor BIRD in Swayze *v.* Carter, 41 N. J. Eq. 231, 3 Atl. Rep. 706.

The only question that has ever been raised as to the value of the maxim is that its application to particular cases is sometimes difficult and embarrassing, and requires great care and discrimination: see Philhower *v.* Todd, 11 N. J. Eq. 312, at page 315. But this may be said of all the fundamental maxims and principles of equity, and must not deter the equity Judge from applying them where properly applicable. Several canons have been suggested by the Judges as guides in this work, but, in construing them, we must not lose sight of the facts in the particular case in which they have been enunciated, and must interpret them accordingly. Lord CRANWORTH, in the House of Lords, in Ramsden *v.* Dyson, L. R. 1 H. L. 129, at page 141, after stating the principle with great clearness, says that, in order that the maxim shall be applicable to a case of this sort, viz., the estoppel by expenditure of money on land, it must have three features—First, the person expending the money must honestly suppose himself to be the owner of the land; and, secondly, the real owner, who encourages the expenditure by his silence, must know that the land belongs to him, and not to the other; and, thirdly, that the other is acting on an erroneous belief as to its ownership. The canon was applied by Chancellor RUNYON in Kirchner *v.* Miller, 39 N. J. Eq. 355.

With regard to the first of these requisites, I have already shown that Mrs. Smith and her grantee, the complainant, were fully justified in supposing, and did actually suppose, that the land belonged to them. But counsel for the defendant insisted that both Mrs. Smith and complainant are chargeable with notice of the record title of defendant, and argued that they had no right in the face of it to suppose that they had title. I cannot accede to this argument. In the first place, I

do not understand that the strength of complainant's proposition depends at all upon her want of knowledge that defendant held the legal title to this land. If she be chargeable with full knowledge of all the record discloses in that respect, still the question remains, Were not she and her mother justified in supposing that this strip, reclaimed, so to speak, by the municipal action from an ancient highway, became, in some way, and as a result of those proceedings, her property? But if the case were wanting in that element, still I do not think defendant's position tenable. Courts of Equity have in many cases given parties the benefit of an honest supposition as to title, where the slightest examination of the record or other equally available source of information would have disclosed their error. In fact, to exclude the application of the maxim from cases where the party has implied or constructive notice of title from the record, would confine its application to a very narrow field. Absence of notice, both actual and constructive, of the adverse title, would, in many cases, give the party the benefit of the plea of *bona fide* purchaser without notice, and dispense with the necessity of setting up estoppel *in pais*. Chancellor ZABRISKIE in Dellett *v.* Kemble, 23 N. J. Eq. 58, held a party entitled to equitable aid against a judgment creditor of his grantor where the judgment creditor had stood by, and, without notice, permitted the former to build on the property in the honest belief that it was free from incumbrance, when he could have discovered the judgment by a search. In Town *v.* Needham, 3 Paige, 545, the title of Harvey, one of the defendants, to an undivided one-fourth of the premises at the death of his grandmother, clearly appeared by the will of the former owner, which was a part of complainant's chain of title; but he was granted relief against Harvey, on the ground that he bought and made improvements in the honest supposition that the other tenants in common, through whom he derived title, had in some way acquired and were the owners of the whole title. So in Brown *v.* Bowen, 30 N. Y. 620, the title, which was barred by estoppel, was found on the public record. In Storrs *v.* Barker, 6 Johns. Ch. 166, the plaintiff claimed under

the devise of a married woman to her husband, and was chargeable with the knowledge that it was void; and it was held that he was justified in supposing that the title had been validated by some action between the devisee and the heir-at-law, and the heir-at-law, having stood by and encouraged the purchase by plaintiff from the devisee, was held estopped. In Chapman *v.* Chapman, 59 Pa. St. 214, where the plaintiff held under a long lease, and the defendants held in severalty parcels of the whole tract under subsequent conveyances from the same original owner, and plaintiff was held estopped from setting up his lease by his positive encouragement as to defendant Chapman, and by his mere silence as to defendant Gansamer, I infer that plaintiff's lease was a matter of record; since, if not recorded, defendants could have pleaded that they were *bona fide* purchasers for value without notice, and need not have relied upon the estoppel.

The position that, in general, record notice of the title is sufficient to defeat the estoppel, where it rests on mere silence, receives qualified support from Prof. Pomeroy in his treatise on Equity Jurisprudence, § 810; and also from Mr. Bigelow in his last edition of his treatise on Estoppel, 594. I have examined the cases cited by these authors in support of the text, and they are all distinguishable from the case in hand. They each lack one of its important features, viz., that the person sought to be estopped by his silence knew, or had reason to suppose, that the person asking the protection of the estoppel was acting in good faith, on an erroneous supposition as to the title. In Fisher *v.* Mossman, 11 Ohio St. 42, the contest was between a mortgagee and the purchaser of the equity of redemption at sheriff's sale under execution against the owner of the equity. The mortgagee was present at the sheriff's sale, and did not give notice of his mortgage, which was recorded, and it was held that he was not estopped by his silence, in the absence of any notice or reason to suppose that the purchaser was ignorant of the existence of his mortgage. In Knouff *v.* Thompson, 16 Pa. St. 357, it appeared affirmatively that the defendant knew of plaintiff's claim, and that

his own title was defective, and, moreover, the improvements made were of very slight value. In Hill *v.* Epley, 31 Pa. St. 331, the contest was between one tenant in common and the purchaser at sheriff's sale of the interest of the other tenant in common, under judgment and execution against him. The matter relied upon in estoppel by the purchaser at sheriff's sale was that the grantor of the party now claiming against him had been present at the sheriff's sale, and had failed to give notice of his title. When the case was first before the Court in 7 Watts, 163, the opinion and decision was favorable to the purchaser at sheriff's sale, and the remarks of the Court and citation of authorities found on page 168 in support of the estoppel are valuable. On a retrial a verdict was rendered in accordance with this opinion in favor of the purchaser at sheriff's sale, and against the owner of the outstanding half interest, and judgment thereon was reversed by the Court in *banc*, in an opinion by STRONG, J. On page 334, 31 Pa. St., he says: "It seems also to be well settled that silence in some cases will estop a party against speaking afterward. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterward be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But silence, without such knowledge, works no estoppel. It is only when silence becomes a fraud that it postpones." And again (page 335): "Clearly, if David Witherow [the plaintiff's grantor and one of the tenants in common] had not attended the sheriff's sale, nothing would have been required of him, after he had his deed upon record. This is conceded. But, if it be admitted that his presence at the sale imposed upon him the duty of giving other notice than that which his recorded deed furnished, and which was consequently known to Epley, it must be because he saw that the purchaser was still acting under an erroneous belief that the whole title was somehow in Samuel [the other tenant in common, and defendant in the execution]. Nothing else

could make his silence work a fraud. But how could he see that? And how is such knowledge affirmatively brought home to him? There is no evidence of any such erroneous belief. The land was being sold as the property of Samuel Witherow, it is true. But Samuel had an interest in the land. Neither the execution nor the sheriff nor the crier asserted that that interest amounted to the entire fee simple, or to an estate in severalty. The sheriff had no right to define what the interest was. The writ was just such a one as it would have been if it had been known by every person present at the sale that Samuel Witherow owned but an undivided moiety. It is impossible, under such circumstances, to see how David's silence could be construed into an admission that Samuel owned the whole, because there was no assertion by the writ, by the sheriff, or by any one that he did. It is equally impossible to discover how David could have supposed that Epley was bidding under the impression, for there was nothing to warrant it, and a deed on record showing the contrary, of the contents of which not only the law presumed, but he had a right to presume, every bidder knew. If the sheriff had offered for sale a tract of land belonging to David in severalty, in which Samuel had no interest, the consequences of silence might have been different."

I believe this to be a correct statement of the doctrine, and I conceive that it fully disposes of the attempt to avoid the effect of the silence in this case by an appeal to the record title. The question is not so much what the party setting up the estoppel might or ought to have known or supposed, as what he actually did know or suppose, to the knowledge of the other party. The New York case (Rubber Co. *v.* Rothery, 107 N. Y. 310, 14 N. E. Rep. 269), much relied upon by defendant, is clearly distinguishable. It lacks the feature of the one party acting on the mistaken supposition that he owned the other party's land, and the other party knowing of the mistake. The case was this: Defendants owned both sides of a stream at a certain point. Further down they owned but one side, while the plaintiffs owned the

other side. Defendants built a dam across the stream above on their own land, and dug a race-way from it on their side of the stream, and built works, which, when put in use, resulted in diverting the whole stream, and carrying it down past the plaintiff's land, before it was returned to its natural channel. Plaintiffs saw these works erected, and made no objection. Defendants set their works in motion, and diverted more than half the waters of the stream, and for that diversion plaintiff brought suit. Now, as defendants clearly had the right to divert one-half the water of the stream, and it did not appear that a beneficial use of the work could not be made with the one-half, or that plaintiff had notice of anything of the sort, it is clear that there was nothing in all that plaintiff saw defendants doing to lead plaintiff to suppose either that defendants supposed that they had a right to divert all the water, or that they intended to do so, or must necessarily do so in order to enjoy their works to their full extent; and besides, it does not appear that the defendants supposed that they had a right to divert all the water, or that, as before remarked, the plaintiff knew or supposed that the defendants were acting on that supposition. The case is somewhat in line with Cooper *v.* Carlisle, 17 N. J. Eq. 525, at page 535. In Kirchner *v.* Miller, 39 N. J. Eq. 355, the complainant made a mistake of a few inches in surveying the line between his land and the defendant's, for which mistake the defendant was not responsible, and of which he was not aware until after complainant had built. The defendant could not be guilty of any acquiescence unless he knew that the complainant was building over on his land, which he did not. The case lacks the features mentioned by Lord CRANWORTH. Moreover, the complainant was able to restore himself at a trifling expense, as shown by the opinion. Brant *v.* Coal Co., 93 U. S. 326, is also clearly distinguishable. There a party, who held a life-estate only, conveyed and took back a purchase-money mortgage which was assigned to the owner of the fee in remainder, who foreclosed. The deed of assignment recited the title truly. Defendant's grantor purchased at the foreclosure sale.

Plaintiff was the owner of the remainder, and at the death of the life-tenant brought suit in equity to restrain mining, etc. Defendant set up estoppel arising out of the foreclosure, and the Court below dismissed the bill on that ground. This decree was reversed on appeal, by a divided Court. Justice FIELD, at page 335, says: "The purchaser was bound to take notice of the title. He was directed to its source by the pleadings in the case. The doctrine of *caveat emptor* applies to all judicial sales of this character; the purchaser takes only the title which the mortgagor possessed. And here, as a matter of fact, he knew that he was obtaining only a life-estate by his purchase. He so stated at the sale, and frequently afterward. There is no evidence that either the complainant or Hector Sinclair ever made any representations to the defendant corporation to induce it to buy the property from the purchaser at the sale, or that they made any representations to any one respecting the title inconsistent with the fact; but, on the contrary, it is abundantly established by the evidence in the record that from the time they took from the widow the assignment of the bond and mortgage of the Union Potomac Company, in 1854, they always claimed to own seven-eighths of the reversion. The assignment itself recited that the widow had owned, and had sold to that company, a life-interest in the property, and that they had acquired the interest of the heirs." Brewer *v.* Railroad Co., 5 Metc. 478, was an action of ejectment, where the party was precluded from setting up equitable estoppel. In Baldwin *v.* Richman, 9 N. J. Eq. 394, Baldwin claimed title by conveyance from Benjamin Richman, and was defeated in an action of ejectment by the heirs of Jeremiah, brother of Benjamin. Jeremiah being the sole owner of the fee of the land in question and other lands, but supposing that he owned them as tenant in common with his brother Benjamin, applied to the Orphans' Court for and procured partition, in which the lot in controversy was set off to Benjamin, who entered, and, after the mistake was discovered, conveyed to Richman, who purchased with full notice of the true state of the title. The bill prayed relief against the ejectment.

Chancellor WILLIAMSON dismissed it on two grounds: First (page 398), that the bill "does not allege that Benjamin took possession of the land and improved it under the impression that the land was his own, nor is there any allegation that it was the conduct of Jeremiah that induced him to take possession and make the improvements. From anything that appears in the bill to the contrary, he knew that Jeremiah was acting under a mistake, and took advantage of it." Second (page 399), that there was an allegation in the bill, but no admission or proof, that Benjamin had made improvements or expended moneys on the land, hence no injury was shown. The case is in all its aspects clearly distinguishable from the one in hand. From the numerous modern cases in other jurisdictions in which the maxim has been applied, I cite the following, which seem to have been well considered: Canal Co. *v.* King, 16 Beav. 630, 22 Law J. Ch. 604; Slocumb *v.* Railroad Co., 57 Iowa, 675, at page 682, 11 N. W. Rep. 641, 644; Ross *v.* Thompson, 78 Ind. 90, 96; Markham *v.* O'Connor, 52 Ga. 198; Chapman *v.* Pingree, 67 Me. 198; Stone *v.* Tyree, 30 W. Va. 687, 5 S. E. Rep. 878; Allen *v.* Shaw, 61 N. H. 95; Morgan *v.* Railroad Co., 96 U. S. 716.

In the case in hand I find it impossible to suppose that defendant did not understand that the complainant was making her improvements in the complete confidence that she had title to the whole of the lot. It would have been an act of the greatest folly, if not outright insanity, in her to have made the improvements if she had supposed any other person owned the strip in question. The transaction spoke for itself; and, as before remarked, there was no pretense at the hearing that defendant did not so understand. He does indeed swear that he thought "these parties" were better prepared to know how much land he had there than he was. But the context shows that he referred merely to the quantity of his land cut off by the change of street lines, and not to the state of the minds of the "parties" alluded to, as to their right to use and occupy it as their own. He did not swear that he did not suppose that Mrs. Sumner made her improvements in the

honest belief that she had full right to the perpetual use and occupation of the strip in controversy. With regard to the knowledge by the defendant that a part of the land in the old street to which he had the legal title lay to the south of the southerly line of the new street, I find no difficulty. An inspection of the map shows that he must have known it, and, besides, he not only does not deny it on the stand, but distinctly admits it. He swears that he did not know how much he had. In fact, defendant's counsel admitted in his brief that his client knew that he owned some land at the point in question, but did not know the quantity. But defendant's counsel further insists that no equitable estoppel arises in this case, because the dwelling erected by complainant was on her own land, and the actual improvements put on the land in dispute were so trifling in amount and cost as not to create a duty on his part to speak. I cannot accede to the proposition necessarily assumed in this position, viz., that it is necessary that there should be an actual use or occupation of the very land in question by some fixed and permanent structure in order to raise an estoppel. The true ground of equitable estoppel I conceive to be that the party, in reliance upon the existence of a certain state of facts, has so changed his position that he cannot be restored to his former position, and will suffer serious loss if the facts prove to be different from what he supposed them to be; and the estoppel arises against the party who is responsible for his action on such mistaken belief, and it operates to prevent him from asserting the contrary. Now, it is palpable that actual occupation by building on land is not the only use a party may make of it, the deprivation of which would result in serious injury to him. For instance, suppose in this case complainant's lot had been but 100 feet deep and 25 feet wide, and defendant's legal title had extended across the whole front, and to a depth of 10 feet, and complainant had built upon the whole lot, except the 10 feet owned by defendant, leaving that as a front yard to his buildings. It is at once apparent that the assertion of title by the defendant to the 10 feet would have been utterly destructive

of the value of complainant's structure. Now, the difference between the case just supposed and the one in hand is one of degree merely.

Counsel in this connection further relies on the fact that the strip claimed by defendant does not reach across the whole front of complainant's lot, but leaves a space of about 30 feet next to Mrs. Smith's line by which complainant can have access to the street. But that space is covered by the Wetmore title, and it was admitted at the hearing that it had not been transferred to Mrs. Smith or to the complainant, unless such transfer resulted in equity from the proceedings before referred to. So that, if the Wetmore title is enforceable as well as defendant's, complainant is shut up to a mere right of way by necessity across her mother's lot. But admitting that complainant has, after deducting the lot claimed by defendant, a frontage on the street of 30 feet, or one-fifth of the width of her lot, it is palpable that the utility as well as the market value of her property will be very injuriously affected if defendant may take exclusive possession of the piece in dispute; and it is equally clear, as before remarked, that defendant must have perceived and known that complainant was acting on the assumption that she owned this piece, and that she would not have built her house if she had not so supposed. If ever there was a case in which the duty of the party to speak was clear, it seems to me it was this case, and that the language of Lord CRANWORTH in Ramsden *v.* Dyson, *supra*, applies: "A Court of Equity considers that, when the one party saw the mistake into which the other party had fallen, it was his duty to be active and state his adverse title; and that it would be dishonest for him to remain willfully passive on such an occasion in order afterward to profit by the mistake which he might have prevented." For these reasons, I think the complainant is entitled to relief, and it only remains to determine its nature and extent.

Courts of Equity do not, in all cases of this sort, push the estoppel to the extent of passing the equitable title, but in proper cases permit the owner of the legal title to hold posses-

sion upon terms of compensating the party who has innocently made improvements upon the erroneous supposition; indemnity to the party entitled to the estoppel being in all cases the end aimed at. It was not, however, suggested at the argument or in the briefs of counsel that remedy by compensation in money would be proper in this case; and it is palpable that it could not. The value of the strip in question for use by itself must be quite insignificant, and the injury to complainant by reason of its exclusive occupation by another is not easily ascertained or measured in dollars and cents. The only mode in which complainant can be fully indemnified is to be protected in the perpetual enjoyment of the land in question, and for that purpose the defendant should be perpetually enjoined from asserting his legal title, and such will be the decree.

To establish a title by estoppel *in pais* the party relying upon it must show:

1. That the party estopped is chargeable with declarations or conduct amounting to admissions inconsistent with what he afterward offers to prove, and respecting facts not equally within the knowledge or reach of both parties: Western N. Y. & P. R. Co. *v.* Richards, 19 Atl. Rep. 931.

2. That he relied and acted upon such admissions, and was deceived thereby: Malloney *v.* Horan, 49 N. Y. 111; De Mill *v.* Moffat, 49 Mich. 125–131; Whitacre *v.* Culver, 8 Minn. 133.

3. That such admissions were intentionally designed by the party charged therewith to influence and mislead him: Turner *v.* Coffin, 12 Allen, 401; Whitaker *v.* Williams, 20 Conn. 104; Copeland *v.* Copeland, 28 Me. 529; Henshaw *v.* Bissell, 18 Wall. 255–271.

In 18 Wall. 271 it is said: "There must be *some intended deception* in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud."

One may be estopped by his acts done through honest mistake under circumstances amounting to culpable or gross negligence: Pence *v.* Arbuckle, 22 Minn. 417; Coleman *v.* Pearce, 26 Minn. 123; Beebe *v.* Wilkinson, 30 Minn. 551; Anderson *v.* Hubble, 93 Ind. 576; Blair *v.* Wait, 69 N. Y. 113; Leather Mfrs. Bank *v.* Morgan, 117 U. S. 109.

Other cases hold that in case of mistake of fact or of legal rights, under circumstances *not amounting to negligence*, the mistaken party is bound by his acts, on the ground that when one of two innocent parties must suffer, it should be the one who caused the injury: Maple *v.* Kussart, 53 Pa. St. 348; Peake *v.* Thomas, 39 Mich. 590; Rosenthal *v.* Mayhugh, 33 Ohio St. 155–168.

In this last case a woman sold land, supposing her husband was dead. He afterward appeared, and conveyed his interest without her joining in the deed. After his death she petitioned for dower, and it was held that she was estopped.

Only he whose conduct was intended to be influenced by the admissions can raise the estoppel: Morgan *v.* Spangler, 14 Ohio St. 102; Mayenborg *v.* Haynes, 50 N. Y. 675; Kinney *v.* Whiton, 44 Conn. 262. But compare Mitchell *v.* Reed, 9 Cal. 204.

But if the admissions are general, or made for the purpose of having them repeated to others, then any one knowing of and reasonably acting upon them may claim the estoppel: Middleton Bank *v.* Jerome, 18 Conn. 443.

Silence alone will not estop, except where it amounts to a fraud; but positive acts of encouragement without a fraudulent intent will be a bar: Maple *v.* Kussart, 53 Pa. St. 353; Beaupland *v.* McKeen, 28 Pa. St. 124.

Dedication.—A dedication of land to the public, after improvements have been made on the strength of it, cannot be rescinded: Livermore *v.* Maquoketa, 35 Iowa, 360; Wilder *v.* City of St. Paul, 12 Minn. 192.

Application.—The principle of estoppel *in pais*, as affecting legal title, will be applied in courts of both law and equity: Copeland *v.* Copeland, 28 Me. 529; Bell *v.* Goodnature, 50 Minn. 417.

Contra.—As violating the Statute of Frauds, this principle as affecting legal title is not applied in some Courts of law: Hayes *v.* Livingston, 34 Mich. 383.

Exhaustive note, 3 Smith's Leading Cases (9th ed.), 2060.

Married Women and Infants.

Estoppel *in pais* does not, as a general rule, apply to married women and infants, not *sui juris*, on the ground that they cannot do by acts *in pais* what they cannot do by deed.

Married Women.

Lowell *v.* Daniels.

Supreme Judicial Court of Massachusetts, 1854.

2 Gray, 161.

One Mrs. Heffrein, while married, conveyed land to one Hooton, her husband not joining, and at the time of the sale she did not disclose her marriage, but antedated her deed and executed it in her former name, as Rachel Smith, for the purpose of deceiving her grantee. Hooton mortgaged the land, and one of the heirs-at-law of Mrs. Heffrein was in possession of the premises when this action by writ of entry was commenced to recover the land by the owner of said mortgage interest.

Thomas, J. The decision of one of the questions raised by the bill of exceptions seems to be conclusive of the rights of the parties, and to this we have confined our attention. That

question is, whether the tenant, whose wife is heir-at-law of Mrs. Heffrein, is estopped to deny the validity of the deed under which, through the deeds of Hooton, the demandant claims.

The deed of Mrs. Heffrein to Hooton, *proprio vigore*, conveyed no estate. The separate deed of a married woman without the assent of the husband, it was absolutely void: Fowler *v.* Shearer, 7 Mass. 21; Concord Bank *v.* Bellis, 10 Cush.

It has no force, because the grantor had no capacity to make it. The instrument has the form and semblance of a deed, and nothing more. Indeed, the demandant does not contend that this deed has of itself any validity; but that, under the facts of the case, the tenant is estopped to deny its validity; or, in other words, the title of the demandant is the result of estoppel, and not of grant; or, to speak perhaps more precisely, of an estoppel that works a grant.

The demandant, to show title in himself, offers the two deeds of mortgage from John B. Hooton. Deeds of warranty, they make *prima facie* evidence of the seisin of the premises in the demandant. The tenant then shows that the premises belonged to Mrs. Smith; that she died intestate; that his wife was her daughter and heir-in-law. The tenant thus makes an elder title. The demandant must now show that the estate that was in Mrs. Smith passed out of her and into his grantor. He undertakes to show it passed by deed. To do this, he must prove not merely the execution of the instrument, but its execution by one having the requisite legal capacity to make a deed. He offers for this purpose a copy from the registry, of a deed, purporting to be from Mrs. Smith to his grantor, bearing date August 1, 1834. Assume that this is sufficient *prima facie* evidence of the execution and delivery of the deed at the time of the date; it is only *prima facie*, and when the evidence is closed, the burden is still on the demandant to show its execution and delivery, by one competent in law for that purpose. When the evidence is in, it appears that this deed was made, delivered, acknowledged, and recorded, when the grantor was a married woman, and incapable of making it;

that is, that it was absolutely void. By force of the deed, then, the demandant wholly fails to show that the land had passed from the tenant's wife's mother to his grantor.

Then the demandant says that the deed, upon its face, bears date of the 1st of August, 1834, when the grantor was sole and capable of making a deed; that it was signed with the name she bore before her marriage with Heffrein; and was so signed and dated with a fraudulent purpose, on her part, of giving the deed an effect, which it would not have had in her true name, and under the true date; knowing it would deceive and impose upon some person to be affected by it; and when the agent of the demandant called upon Mrs. Heffrein, stating to her that he wished to examine Hooton's title, and informing her that the application was made with a view to a mortgage, she produced the deeds of the land to herself, but did not communicate to the agent any defect in Hooton's title; and that, therefore, whether the fraudulent purpose was to deprive her husband of his interest in the estate, or any other, the grantor and her heirs are estopped to deny that the date of the deed, which she executed and caused to be recorded, was the true date; and as against her and her heirs the deed will be taken to be of the same effect as if it had been executed and delivered at the time of its date, when she was unmarried and had capacity to execute it; or, in other words, the tenant is, upon these facts, estopped from setting up any title in Mrs. Heffrein at the time Hooton conveyed to the demandant. This we understand to be the view of the case taken by the learned Judge, though perhaps in a critical examination of the language used by him, the silence of the grantor as to the defect of Hooton's title will not be found to be included as an element in the instruction given to the jury.

This raises the material question at issue between the parties, whether a married woman and her heirs may be barred of her estate by an estoppel *in pais*.

She can make no valid contract in relation to her estate. Her separate deed of it is absolutely void; any covenants in such separate deed would be likewise void. If she were to

covenant that she was sole, was seised in her own right, and had full power to convey, such covenants would avail the grantee nothing. She could neither be sued upon them, nor estopped by them. The law has rendered her incapable of such contract, and she finds in her incapacity her protection; her safety in her weakness. Her most solemn acts, done in good faith, and for full consideration, cannot affect her interest in the estate, or that of the husband and children. The strongest possible example of this was presented in the case of the Concord Bank *v.* Bellis, above cited, in which it was held that where an estate was conveyed to a married woman, and she at the same time gave back a deed of mortgage to secure a part of the purchase-money, such deed of mortgage was wholly void. And we think a married woman cannot do indirectly what she cannot do directly; cannot do by acts *in pais* what she cannot do by deed; cannot do wrongfully what she cannot do rightfully. She cannot by her own act enlarge her legal capacity to convey an estate.

This doctrine of estoppel *in pais* would seem to be stated broadly enough, when it is said that such estoppel is as effectual as the deed of the party. To say that one may, by acts in the country, by admission, by concealment, or by silence, in effect do what could not be done by deed, would be practically to dsspense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates.

But if Mrs. Heffrein was personally estopped to say this deed was executed by her while under coverture, we are not prepared to say that the daughter would be so estopped. The condition of the estate was this: The fee was in Mrs. Heffrein, with limited power of alienation; with no power indeed to convey, except by the joint deed of herself and husband: Rev. Sts., c. 59, § 2; and with no power to devise it. The law had given her no power by any act of hers to change the destination of the estate, or impair the title which at her decease would vest in her child. Upon her decease, the daughter enters into possession of the estate. She is rightfully there; the estate is in her,

unless there has been an alienation of the estate in the mode prescribed by law, in the lifetime of the mother. If it be said that the mother was guilty of misrepresentation and concealment, for which coverture affords no protection; the answer might well be, that whatever might be the effect upon her personally, even if it estopped her to claim any interest in the estate, it could not do what the statute has not done, give her a power so to alienate the estate as to prevent the entry of her heirs-at-law upon her decease.

Such seems to us the result of the application of well-settled principles of law to the case at bar. And upon a somewhat diligent examination of the authorities, we have found none to lead us to a different conclusion. The diligence of the counsel for the demandant has cited but two cases, having much tendency even to sustain the position that the estate of a married woman, incapable of making a deed, may pass by estoppel *in pais*. These are Hunsden *v.* Cheyney, 2 Vern. 150, and Savage *v* Foster, 9 Mod. 35.

In both these cases the husband and wife, who jointly were capable of levying a fine, were parties to the original frauds. They were both suits in equity against the parties to the fraud. They both rely, as matter of authority, upon the case of the estoppels of infants, who are not incapable of conveying, but whose deeds are voidable only and not void; and neither of the cases, we think, entitled to the highest consideration. If they establish the point, for which they are cited, that the estate of a married woman may pass by her acts *in pais*, not only without the concurrence of the husband, but in fraud of his rights, we should question their application under our system, where the statute of frauds is equally binding in Courts of Equity as of law; where the powers of married women, in the conveyance or devise of lands, are defined and limited by express statute; and where the titles to real estate are matters of public record.

No case at law has been cited, nor have we found one, in which it has been held that the estate of a party has been barred by estoppel *in pais*, who was incapable of conveying by

deed. And though Courts of law have liberally applied the doctrine of estoppel *in pais* to cases of personal property, in the transfer of which no technical formalities intervene to prevent its application, we know of no case in which it has been applied to a party incapable in law of making a contract.

The result of the views we have felt compelled to take of the case is, that the deed of Mrs. Heffrein to the demandant's grantor was absolutely void, and that this tenant is not estopped to deny its validity.

New trial in this Court.

Concord Bank *v.* Bellis, 10 Cush. 276; Morrison *v.* Wilson, 13 Cal. 494; Glidden *v.* Strupler, 52 Pa. St. 400.

Infants.

WIELAND *v.* KOBICK.

Supreme Court of Illinois, 1884.

110 Ill. 16.

Mr. Chief Justice SHELDON: This was an action of ejectment for the recovery of a certain lot of land in an addition to Chicago. There was recovery by the plaintiff, and the defendants appealed.

On the trial in the Court below there was introduced in evidence, in defense, a deed from the plaintiff to Emily C. Cummings, in which it is recited that "Margaretha David, (the plaintiff), unmarried, *and of age*," for $3,500 conveys and quit-claims to Emily C. Cummings the property in question, and a deed from Emily C. Cummings to Anna C. Haas, one of the defendants. The plaintiff then introduced evidence to prove that at the date of the deed to Emily C. Cummings the plaintiff was a minor, and under the age of eighteen years, and that after coming of age she filed her disaffirmance of the deed, and a demand for possession of the premises, in the recorder's office of Cook County.

It is objected that the evidence is not sufficient to justify a

recovery against all of the defendants, as there is no evidence to connect the three other defendants with Anna C. Haas. Defendants having pleaded the general issue only, it was not necessary, under the statute, for plaintiff to prove that defendants were in possession of the premises, or claimed an interest or title therein: Rev. Stat. 1874, chap. 45, § 22.

The only other question which appellants make upon the record is as to the effect of plaintiff's deed to Emily C. Cummings, whether or not plaintiff was estopped from disaffirming such deed made while she was a minor, she having stated therein that she was of age. The authorities seem abundantly to establish that a defendant is not estopped from setting up infancy as a defense to a contract, by his fraudulent representations that he was of full age: Merriam *v.* Cunningham, 11 Cush. 40; Studwell *v.* Shapter, 54 N. Y. 249; Gilson *v.* Spear, 38 Vt. 311; Burley *v.* Russell, 10 N. H. 184; Conrad *v.* Lane, 26 Minn. 389; Brown *v.* McCune, 5 Sandf. 288. In the latter case the Court said: "We are not aware that any case has gone the length of holding a party *estopped* by anything he has said or done while he was under age, and we think it would be repugnant to the principle upon which the law protects infants from civil liabilities in general." And further on: "We are clear that the doctrine of estoppel is inapplicable to infants."

The conclusion, we think, from the authorities, must follow that the statement in the deed of plaintiff that she was of age is not an estoppel to the disaffirmance of it.

The judgment will be affirmed.

Judgment affirmed.

The rule applies when the false statements are not contained in the deed itself: Conrad *v.* Lane, 26 Minn. 389; Burley *v.* Russell, 10 N. H. 184; Buchanan *v.* Hubbard, 96 Ind. 1.

False statements as to ability to pay: Studwell *v.* Shapter, 54 N. Y. 249.

Mere silence when the grantee is known to believe the grantor to be of age: Baker *v.* Stone, 136 Mass. 405; Rice *v.* Boyer, 9 N. E. 420; 108 Ind. 472.

Exception.

But estoppel *in pais* does apply to married women, and infants of years of discretion, in cases where their declarations or conduct amount to a tort; as, where they are not parties to the contract or conveyance involved; on the ground that, being liable for their torts, their lands might be subjected to the satisfaction of a judgment thereupon, and by estoppel circuity of action is prevented.

Married Women.

GRAY *v.* CROCKETT.

Supreme Court of Kansas, 1886.

35 Kan. 66, 686; 10 Pac. Rep. 452.

One Long contracted to sell to Gray, this plaintiff, a certain tract of land, the title of which was in Mrs. Long, defendant's wife. When this contract was made and executed Mrs. Long was present; she heard the contract stated, and knew its terms and conditions, and did not dissent therefrom. She did not disclose her own ownership, and the deed by which she acquired title was not of record. Gray supposed that Long was the owner, as he was living on the land. Long refusing to convey the land according to the contract, Gray sues for specific performance thereof. Mrs. Long then asserts her title, and the Court below held that she was not estopped. Hence this appeal.

HORTON, C. J. It is claimed by the plaintiff that the order directing the trial of this cause to be had in Douglas, instead of Wyandotte, County is void, and, if not void, is at least erroneous. The order was based upon the affidavit of H. C. Long, one of the defendants, setting forth "that he was advised by his attorney that Hon. W. R. WAGSTAFF, the district Judge, was a material witness for the defendants upon the trial; that he believed the advice to be true; and that he desired the testimony of the Judge at the trial, and intended to procure the same if a change of venue was granted."

Section 56 of the Civil Code reads:

"In all cases in which it shall be made to appear to the Court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the Judge is interested, or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the Court may, on application of either party,

change the place of trial to some county where such objection does not exist."

The contention is that a district Judge is not "disqualified to sit," even if a material witness in a case, and that the affidavit upon which the order changing the place of trial to Douglas County was made was insufficient, in that it did not set out what the defendants expected to show by the Judge, nor was it otherwise made to clearly appear that the Judge was a material witness.

We do not think the order of the Court void. A Judge is not competent as a witness in a cause tried before him, for this, among other reasons: that he can hardly be deemed capable of impartially deciding upon the admissibility of his own testimony, or of weighing it against that of another. It is now well settled that the same person cannot be both witness and judge in a cause: 1 Greenl. Ev. (12th ed.), § 364; Ross *v.* Buhler, 2 La. (N. S.) 312; 2 Bouv. Law Dict. 12. Therefore we think that where a Judge is a material and necessary witness in a case he is "disqualified to sit." If the District Court had overruled the application to change the place of trial upon the affidavit presented, we would unhesitatingly pronounce the ruling eminently correct, because it seems to us that the true rule in such a case is that such facts and circumstances must be proved by affidavits, or other extrinsic evidence, as clearly show that the Judge is a material and necessary witness, and unless this clearly appears, a reviewing Court will sustain an overruling of the application: City of Emporia *v.* Volmer, 12 Kan. 622. The affidavit in this case for the change of venue should have disclosed how the attorneys obtained knowledge of the fact that the district Judge was a material witness, and all the facts the defendants believed the Judge would prove. This was not done; but, although the affidavit is deficient in this respect, we cannot wholly ignore the personal knowledge of the Judge who transferred the case. A Judge ought not to transfer a case upon a mere suggestion, or even upon an affidavit stating conclusions only, and no change of venue should be granted except for

cause, true in fact and sufficient in law, and all of this should be made to clearly appear to the Court; but when an affidavit is presented in general terms for such a change, and the Judge has personal knowledge that he is disqualified to sit, a change of venue ordered by him upon the affidavit, and his own personal knowledge that he is disqualified, cannot be declared erroneous: City of Emporia *v.* Volmer, *supra;* Edwards *v.* Russell, 21 Wend. 68; Moses *v.* Julian, 45 N. H. 52.

The contract set forth in the petition is as follows:

"APRIL 22, 1881.

"Agreement between H. C. Long and B. Gray for sale of his farm of thirty-three acres, south side of Tauraume Street, Wyandotte, for eight thousand dollars. Said Long agrees to sell the said farm for $8,000, payable as follows: $500 by the 28th of April inst.; $1,500 in three months from date; and balance, $6,000, in three years, with interest at eight per cent. Gray agrees to make payments as above, and pay Armstrong's commission, not exceeding $100. Gray to have possession when $2,000 is paid, and deed then to be given, and mortgage then given to Long for three years, at eight per cent. interest, with the privilege of paying the whole or part sooner.

"H. C. LONG.
"B. GRAY."

The principal and the important question involving the merits of this case arises upon the following finding of fact:

"At the time of the making of the written agreement Martha M. Long, wife of H. C. Long, was present, heard the contract stated, knew the terms and conditions thereof, and did not dissent therefrom, excepting she expressed a desire that the deferred payments should draw ten per cent. interest instead of eight per cent., as provided in the contract."

A further finding of the trial Court is to the effect that Mrs. Long was the owner in fee simple of the real estate in controversy; and, as a conclusion of law, upon all the facts found, the Court decided that Mrs. Long was not estopped from asserting her ownership or title to the same by reason of any

act of hers suffered or done before, at the time, or since the making of the written contract of April 22. At the time of the execution of this contract Long and wife lived upon the land within the city of Wyandotte, and the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, under which Mrs. Long claims title, was unrecorded. It had been delivered to the register of deeds of Wyandotte County for record in the year 1860, but was placed with other deeds in a package, where it remained until found by the register in the fall of 1883. It could only have been found by a person having such knowledge of the business management of the register's office as to induce an investigation of the package containing the same. The written contract shows upon its face that H. C. Long sold the land as his own. It is indisputable that the plaintiff supposed he was dealing with Long as the owner of the land; and that both husband and wife were willing to sell is evident from the fact that they did shortly thereafter sell at an advance. Mrs. Long asserted no title to the premises until after the decision of this Court, in June, 1883, that the land was within the limits of the city of Wyandotte, and therefore that only one acre thereof was exempt as a homestead: Gray *v.* Crockett, 30 Kan. 138; s. c. 1 Pac. Rep. 50. This was more than two years after the execution of the written contract. Upon the belief that Long was the owner of the land, the plaintiff commenced his suit for specific performance of his contract on March 3, 1882. This suit was prosecuted by him for over a year without Mrs. Long making her title known, and the money and time of the plaintiff was expended in his attempt to obtain the conveyance which H. C. Long had agreed to execute. When the case was tried at the July Term of the Court for 1882 it was admitted by all the parties, for the purposes of the trial, that on April 22, 1881, H. C. Long was the owner of the land described in the contract.

Upon the findings of fact, we think Mrs. Long is estopped, in equity, from now asserting that at the time of the contract between the plaintiff and her husband she was the owner of the premises described therein. Questions relative to estoppel

are not, in general, controlled by technical rules, but are usually determined upon principles of equity and good conscience. Mrs. Long stood by and allowed the contract to be executed; to some extent she participated in the negotiations preliminary to the execution of the contract. Her silence as to her title, her acquiescence at the time of the contract, and her failure to disclose her title during the earlier stages of this litigation, invoke against her the familiar rule of justice, that if one stands by and allows another to purchase his property without giving him any notice of his title, a Court of Equity will treat it as fraudulent for the owner to afterward try to assert his title. "He who will not speak when he *should* will not be allowed to speak when he *would*:" Goodin *v.* Canal Co., 18 Ohio St. 169; Tilton *v.* Nelson, 27 Barb. 595; Foster *v.* Bigelow, 24 Iowa, 379; Anderson *v.* Armstead, 69 Ill. 452; Thompson *v.* Sanborn, 11 N. H. 201; Ford *v.* Loomis, 33 Mich. 121; Beatty *v.* Sweeney, 26 Mich. 217; Dougrey *v.* Topping, 4 Paige, 93.

Judge THOMPSON, in an article concerning estoppels against married women, says:

"If a married woman owns real property, but her title is not of record, and her husband enters into a contract for the sale of it, of which she is informed at the time, and to which she makes no objection, she will be estopped from setting up her title to the land to defeat a suit brought against her husband for specific performance of his contract, and so would her grantee:" 8 South. Law Rev. (N. S.) 275–310; Smith *v.* Armstrong, 24 Wis. 446; Catherwood *v.* Watson, 65 Ind. 576.

We are of the opinion, therefore, that the conclusion of law of the trial Judge that Mrs. Long was not estopped from asserting her ownership or title to all the premises in dispute is erroneous, and cannot be sustained.

It is again insisted that defendants are entitled to judgment, even though the homestead included only one acre, as the contract was for the entire tract at a price in gross, and not so much per acre; and as the homestead acre was inalienable by the husband alone, and was in no manner identified in the contract or its price determined, that there is no way of appor-

tioning the price of the thirty-two acres which the husband could sell. In addition to what is stated upon this point in the former opinion of this Court in Crockett *v.* Gray, 31 Kan. 346; s. c. 2 Pac. Rep. 809, it appears to us from the record that H. C. Long and wife have no real complaint to make. Upon the trial the plaintiff offered these defendants the privilege of selecting their own homestead; therefore they will have the right to retain any acre of the land described in the contract which they may choose. The plaintiff only asks that his contract be enforced after these defendants select and retain one acre thereof. As was said by Mr. Justice BREWER, speaking for this Court when the case was last presented to us for our determination: "It is equitable that the contract of April 22, 1881, be enforced so far as is possible, and not that the contracting party be permitted to avoid his contract obligations." When Mrs. Crockett purchased she had notice of the prior sale of the premises to plaintiff, and therefore acted with full knowledge of all his rights: Meixell *v.* Kirkpatrick, 33 Kan. 282; s. c. 6 Pac. Rep. 241. L. H. Wood was the agent for Mrs. Crockett, and when she purchased, on December 24, 1881, she had no actual knowledge of the deed from Long to Vedder of September 30, 1860. This deed was found by Wood in a package in the register's office about September 10, 1883; therefore Mrs. Crockett bought the land with ignorance of the title of Mrs. Long, and, like the plaintiff, supposed she was dealing with Long as the owner. After the first trial of this case Mrs. Crockett became afraid of her title, and desired to sell the land. L. H. Wood then negotiated a sale of it from her to his father-in-law, the latter paying the same price that Mrs. Crockett did, with interest on her money. As all of these sales were made through L. H. Wood, and as he acted as agent both for Mrs. Crockett and his father-in-law, and had notice of all the rights of plaintiff, the latter parties are charged with his knowledge. Wood, and the principals for whom he acted, dealt with the land as that of Long, upon the belief that the contract of April 22, 1881, could be avoided solely because the land described therein was outside of the limits of the

city of Wyandotte, and therefore, being the homestead of H. C. Long and wife, could not be alienated without their joint consent. The attempt to set aside the contract of April 22, 1881, upon the ground that Mrs. Long was then the owner of the premises, is an after-thought, evidently not contemplated when the joint answer of the defendants was filed.

The statute provides that in cases decided by this Court when the facts are found by the Court below, this Court will send a mandate to the Court below directing it to render such judgment in the premises as it should have rendered upon the facts found. Under the statute, therefore, in view of the conclusion obtained, as none of the findings are excepted to by the defendants, the cause must be remanded, with directions to enter judgment for the plaintiff: § 559, Code. Of course the plaintiff is only entitled to the enforcement of the contract of H. C. Long. He did not bargain for or purchase the *supposed inchoate interest* of Mrs. Long. She did not sign the contract, and was not asked to sign the same. The plaintiff is entitled to what his written contract calls for. The decree, however, for the specific performance of the contract, as well on the part of H. C. Long as of Mrs. Crockett, must be so framed as to fully protect such inchoate interest of Mrs. Long, as the wife of H. C. Long, whether owned by herself or, subsequent to the contract, transferred to her co-defendant, Mrs. Crockett. The rights of the plaintiff are the same as though the deed from H. C. Long to Richard L. Vedder, of September 13, 1860, had never been executed, and as though there had been no conveyance subsequent to the contract from H. C. Long to Elizabeth I. Crockett.

The judgment of the District Court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

Other cases claim that even if she is not a party to the conveyance she cannot be estopped by matter *in pais*, holding that the only way she can transfer her title is by deed: Unfried *v.* Heberer, 63 Ind. 67; Behler *et ux. v.* Weyburn, 59 Ind. 143.

As to when an infant is liable in tort for his fraud, see Gilson *v.* Spear, 38 Vt. 311.

Infants.

BLAKESLEE *v.* SINCEPAUGH.

Supreme Court of New York, 1893.

71 Hun, 412.

The plaintiff, a minor, owned certain lands, and defendant, thinking they were owned by the minor's grandfather, purchased them of him, being assured by the plaintiff at the time that he had no title or interest whatever in or to the same. Defendant, having paid for the land, went into possession, and plaintiff brings an action of ejectment.

MERWIN, J. Upon the trial of this action it was shown on the part of the plaintiff that Havilla D. Blakeslee, by deeds dated September 25, 1834, and September 22, 1838, became the owner of a quantity of land, and thereafter, by deed dated December 3, 1880, and duly recorded December 4, 1880, he with his wife, conveyed the same to the plaintiff, excepting sixteen acres theretofore conveyed to the plaintiff. The premises in dispute are a part of the lands described in these deeds. The consideration of the deed of December 3, 1880, as stated in the deed, is the sum of one dollar and the maintenance and support of the parties of the first part during their natural lives. It was then shown on the part of the defendant, that Havilla D. Blakeslee and wife, by warranty deed dated December 1, 1882, and recorded December 5, 1882, conveyed the premises in dispute to the defendant for the consideration therein named of $680, which defendant at the time paid to the grantor or the person acting for him. Havilla D. Blakeslee was the grandfather of plaintiff, and evidence was given tending to show that plaintiff at this time lived with his grandparents, on the farm of which the premises in question were a part; that he knew of the negotiations for the purchase by defendant of the grandfather; that during these negotiations the defendant saw the plaintiff, told him he was talking about buying a piece of land of his grandfather, and had heard that he, the plaintiff, had an interest in it, and asked him whether that was so, and whether he had any deed or mortgage against it;

and he, the plaintiff, replied that he had no deed or mortgage against it, and had no interest in his grandfather's premises; that the plaintiff at the time knew that he was the legal owner of the property, and made the statement to defendant with intent to deceive him and induce him to buy of the grandfather; that the defendant thereupon, in reliance upon the truth of plaintiff's statement, and in ignorance of the true state of the title, made the purchase of the grandfather.

The plaintiff denied making the representations or that he knew that his deed covered the property conveyed to defendant. It was also shown that plaintiff was then a minor, having been born March 6, 1862.

At the close of the evidence the counsel for plaintiff asked the Court to direct a verdict for the plaintiff upon several grounds, chiefly that the evidence upon the part of the defendant was not sufficient to constitute an estoppel; that at the time of the alleged statements the plaintiff was an infant, and that if he made the statements he did not know at the time whether or not he owned the land, and that no fraud was shown upon his part, and that the defendant was guilty of negligence in not causing the records to be searched. The Court denied the motion, and stated that in its opinion the better way to dispose of the case was to submit it to the jury on four questions: "*First*, whether these statements were made by the plaintiff to the defendant; *second*, whether the plaintiff had knowledge at the time he made them that he was the legal owner of the land; *third*, whether they were made by the plaintiff with the intention that they should be acted upon by the defendant in the purchase of the land; *fourth*, whether they were acted upon and relied upon by the defendant when the land was purchased by him." The plaintiff's counsel duly excepted to such ruling and to the denial of the motion. The case was thereupon submitted to the jury upon the line suggested by the Court, and a general verdict rendered for the defendant. There was no exception to the charge and no request that any other question should be submitted to the jury.

1. The first proposition now presented by the plaintiff is that

the plaintiff, being an infant at the time of making the alleged statements, was not estopped thereby.

Assuming, as we must, that the facts, so far as warranted by the evidence, were found against the plaintiff, we have here a case of intentional fraud. In Spencer *v.* Carr, 45 N. Y. 406, where, as here, it was claimed that an infant was barred of her title by an equitable estoppel, it was held that in the absence of intentional fraud upon her part she would not be estopped, and that as that was not found she would not be deprived of her legal rights. The inference is that if there was intentional fraud the doctrine of equitable estoppel would apply notwithstanding infancy. The opinion of the Court in the case strongly supports this inference, in cases where the infants are of sufficient age to appreciate their rights and duties. We are referred to no case in this State where the views suggested in Spencer *v.* Carr are criticised. In Brumfield *v.* Boutall, 24 Hun, 457, the question of fraud on the part of the infant was not up, nor was it in Sherman *v.* Wright, 49 N.Y. 231. The same may be said as to Ackley *v.* Dygert, 33 Barb. 176. In Brown *v.* McCune, 5 Sandf. 224, decided in 1851, it was held that fraudulent representations as to his age did not bind an infant. This case was criticised, and the opposite rule held in Eckstein *v.* Frank, 1 Daly, 334. In Green *v.* Green, 69 N. Y. 553, a father had taken a deed from his minor son and paid him the consideration, and the question was whether the son, on becoming of age, could repudiate the deed without restoring the consideration. It was held that he could, it appearing that the money was spent and he had no other property with which to replace it. There was no question of fraud in the case.

In 1 Story's Equity, § 385, it is said in reference to cases like the present that "cases of this sort are viewed with so much disfavor by Courts of Equity that neither infancy nor coverture will constitute any excuse for the party guilty of the concealment or misrepresentation ; for neither infants nor *femes covert* are privileged to practice deception or cheats on other innocent persons." In 2 Sugden on Vendors, 8th Am. ed. 507, chap. 23, § 1, pl. 17, it is said: "If a person having a right to an estate

permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert, or under age." In 2 Pomeroy's Equity, § 815, it is said: "An equitable estoppel arising from his (the infant's) conduct may be interposed, with the same effect as though he were adult, to prevent him from affirmatively asserting a right of property or of contract in contravention of his conduct upon which the other party has relied and been induced to act." Numerous cases are cited to each of the quoted propositions. The same rule is stated in Bigelow on Estoppel, 488. See, also, note in 44 Am. Dec. 386; Bispham's Eq., § 293.

There is no doubt in the present case that the infant was of sufficient age to appreciate his rights and duties. He lacked only a few months of being of age. The rule to be inferred from the Spencer case, as to the application of the doctrine of equitable estoppel to infants, while it may not be entirely consistent with the supposed disability and need of protection of infants, has, I think, the weight of authority in its favor, and it should be followed by us in this case. The Court below, therefore, properly held that the fact that plaintiff was an infant did not of itself relieve him.

2. The plaintiff further claims that he should not be estopped because he had no knowledge that he owned the land in dispute. This, however, upon the evidence was a question of fact and was found adversely to plaintiff.

3. It is further claimed that the burden of proof is on the defendant, and that the testimony being evenly balanced defendant must fail. It is true that the burden of proof was on the defendant, and that statements testified to by the defendant were denied by the plaintiff. It was, however, for the jury to determine where the truth was, and there were many surrounding circumstances that bore upon the question.

4. It is further claimed that the defendant was guilty of *laches* in neglecting to consult the records in the clerk's office, and the case of Trenton Banking Co. *v.* Duncan, 86 N. Y. 221, is cited in support of the proposition. In that case the plaintiff, who sought the benefit of an estoppel, neither looked at the

record nor made any inquiry of anybody as to the ownership of the property, and it was held that its failure to examine the record and make inquiry prevented its recovery. The present case is materially different. So in McCulloch *v.* Wellington, 21 Hun, 5, there were no representations by the owner, but, as said in the opinion at page 14, it was the case of a purchaser who, from his confidence in the vendor, or from other circumstances, not imputable to the claimant, has purchased property and omitted to make the necessary and ordinary examination of title. In Lyon *v.* Morgan, 19 N. Y. Supp. 201, the effect of failure to examine the record was not determined, and the case was decided upon other grounds.

If the present case was one where the owner was simply silent, it may be that the constructive notice from the record would prevent the defendant from receiving any benefit from the doctrine of estoppel. But assuming there were false representations and intentional fraud, the rule would be different: Brinckerhoff *v.* Lansing, 4 Johns. Ch. 65; Fisher *v.* Mossman, 11 Ohio St. 47. As said by Judge STRONG in Hill *v.* Epley, 31 Pa. St. 334: "It should never be forgotten that there is a wide difference between silence and encouragement."

"A party setting up an equitable estoppel is himself bound to the exercise of good faith and due diligence to ascertain the truth:" 2 Story Eq., 12th ed., § 1553 b. Whether the defendant in that respect was negligent under the circumstances of the present case was a question of fact: Moore *v.* Bowman, 47 N. H. 494. The Court below was, therefore, correct in holding that it should not be said, as matter of law, that the defendant was guilty of negligence.

5. The appellant claims that incompetent testimony was admitted to his prejudice, but we find no ruling that supports this contention.

No other question is presented. It follows that the judgment should be affirmed.

3 Washb. R. P. 77; Bigelow on Est. 602; Galbraith *v.* Lunsford, 9 S. W. Rep. 365; 87 Tenn. 89; Oglesby Coal Co. *v.* Pasco, 79 Ill. 164; Rice *v.* Boyer, 9 N. E. 420, 108 Ind. 472.

Modern Tendency.

Many cases hold that estoppel *in pais* applies to married women and infants, whether the fraudulent conduct is in connection with their contracts or independent of them, on the ground that they shall not use the law protecting them as a shield for their frauds.

PATTERSON *v.* LAWRENCE.

Supreme Court of Illinois, 1878.

90 Ill. 174.

Mr. Justice WALKER. In the month of August, 1867, Melvina Brazee was married to one Robert Patterson. On the second day of the following September she obtained a conveyance of lot 9, in block 45, of the original plat of the city of Galesburg. The conveyance was to her by the name of Melvina Brazee, which was her name by a former husband, from whom she was divorced. On the same day she executed, by the same name, a deed of trust to O. F. Price, for the use of N. Brisco, on this lot, to secure the payment of $600, which sum she paid for the lot. On the 8th of September, 1868, she went to one McChesney, an insurance and loan agent, to procure a loan of money, introducing herself as Mrs. Brazee, saying her property was advertised for sale under the trust deed, and she would lose it unless she could procure $600. McChesney stated the facts to R. A. Lawrence. Lawrence offered to loan the money to her if she would secure its payment. The title was examined, and found to be in her name as Brazee, and being asked by McChesney if she was a widow, she answered she was. Being satisfied with the title and security, Lawrence loaned the money, and took two notes, of $300 each, drawing ten per cent. interest, executed by her in the name of Melvina Brazee, and also a trust deed on the lot, in the same name. Failing to pay the interest at the expiration of a year, she requested the loan of $40, which Lawrence let her have, and took a note for $100 to cover the interest and this loan, securing the same by a second trust deed, executed in the same manner. Failing to make payment at the

end of the second year, the property was advertised and sold under these trust deeds, and purchased by Lawrence for the amount of the debt, interest, and costs, and he received a conveyance from the trustee.

It also appears, that Mrs. Patterson took a lease in the name of Brazee, and an agreement, that on the payment of $900 by the 1st of February, 1871, Lawrence would convey the premises to her. On the termination of the lease she refused to surrender possession. Thereupon, Lawrence commenced an action of forcible detainer, to recover possession, and at the trial she produced the certificate of her marriage to Patterson, which seems to have been the first information which came to Lawrence's knowledge that she was a married woman, or her name was not Brazee. That suit was dismissed, and a bill in chancery was filed, setting up the facts, charging fraud in procuring the money and in the execution of the trust deeds, and alleging that there was due $798—that the property belonged to Mrs. Patterson, and her husband had no interest therein. The bill charges, that by reason of the fraudulent concealment of her marriage, and the husband not joining in executing the trust deeds, the fee to the lot did not pass by the sale to complainant, and prays that the title be decreed to be in complainant, and for other and further relief.

An answer was filed, admitting that she executed the trust deeds in the name of Brazee because the title was so conveyed to her, and she supposed it was necessary, to convey title; sets up her coverture, and denies all fraud on her part, and the indebtedness is that of the husband, and not of the wife; denies all right to relief. A replication was filed.

On a hearing, the Court below, on bill, answer, replication, and proofs, found for complainant, found the amount due, and ordered that in default of its payment in thirty days the master sell the lot, on the usual notice, subject to redemption. Defendant, Melvina Patterson, brings the record to this Court on error, and asks a reversal.

It is urged in affirmance, and as the Court below found, that this loan was obtained by fraud. On the other side it is

claimed, and set up in the answer, that plaintiff in error intended, at the time, to execute the trust deeds in such a manner as to be valid and binding—that no fraud was intended and none was perpetrated. McChesney swears postively that he asked her the question whether she was a widow, and she said she was, and that this was before the loan was made; and defendant in error testified that she always represented herself to him as a single woman. On the contrary, plaintiff in error denies that she ever made such statements to either of them. It is insisted that she is corroborated by Dr. McDowell, with whom she consulted at McChesney's office, on the day she says she obtained the money, in reference to the sickness of her husband; but they state McChesney or defendant in error was not present.

This evidence, we think, strongly preponderates in favor of defendant in error. He and McChesney seem to testify fairly. On the other hand, plaintiff in error seems to have, from the beginning, acted in bad faith. She introduced herself to McChesney, and defendant in error says to his family, as Mrs. Brazee. We apprehend no one is so ignorant as not to know, in this country, that the name of the wife is, by the marriage, changed to that of the husband. She, then, must have known, when she passed herself by the name of her former husband, that she was stating what was not true—that if believed, she was deceiving defendant in error—and that he was relying on such statement. She could not have been so ignorant as not to have known that she was not signing her name to the notes and trust deeds. Why, if not for fraudulent purposes, did she thus give her name and so sign these papers? She says she supposed it was necessary because the deed was in that name. She should have given her true name, and it was a fraud to conceal it. If an unmarried woman, a widow, using her former name, were to so act, would not all persons say that such person was guilty of fraud? That concealing their own name and the use of the name of another, or a fictitious name, is evidence of deliberate, intentional fraud? Would any one credit the pretense that the

party supposed he was acting properly? Then, why should this be distinguished from the supposed case?

We are clearly of opinion that plaintiff in error was guilty of fraud in misrepresenting her name, in using a fictitious name, and also, in concealing her name, when she must have known that defendant in error would not have loaned the money and taken the trust deeds, without her husband joining with her in their execution, if she had given her true name and disclosed the fact that she was married.

Plaintiff in error testified her husband told her to come from Burlington to Galesburg and do the best she could; that she transacted the business and got the loan before she returned. When she got back she told him she had transacted her business satisfactorily. Now, it is but a reasonable inference to suppose she consulted with her husband in reference to this business, and it would not be a violent presumption to conclude it was planned and arranged between them that she should pass herself by the name of her former husband in procuring the loan, and this would be more easily done as she was known by that name by her neighbors. It is not probable she would take so important a step without consulting with her husband as to the manner in which it should be done.

We are unable to find any feature in this case that commends it to our sense of right. To permit plaintiff in error to retain the money and property would be unjust in the extreme, and surely cannot comport with equity and good conscience. It is not denied that if plaintiff in error intentionally committed a fraud she would be estopped to deny the effect of the execution of the deeds of trust. That she, in fact, committed a fraud, there would seem to be no doubt, and if permitted to escape liability on her deeds, she would have consummated a palpable wrong. She purchases property, borrows money to pay for it by pledging it, and then refuses to pay, and insists that the instruments pledging it are void, although she says she then acted in good faith, and intended to bind the property for the payment of the money.

This Court, in the case of Oglesby Coal Company *v.* Pasco, 79 Ill. 164, reviewed the authorities, and announced the rule that a married woman may preclude herself from denying the truth of her representations in cases of torts, but where her conduct relates to contract, there can be no estoppel. So, in the cases of Schwartz *v.* Saunders, 46 Ill. 18, and Anderson *v.* Armstead, 69 Ib. 452, it was held that where a wife fraudulently permitted her husbund to represent himself as the owner of her separate property, and procure mechanics to make valuable improvements thereon, without disclosing her ownership or repudiating his authority, she is estopped afterward from denying his authority to cause the improvements to be made, when the mechanics seek to enforce their liens for payment of the amount due them for work done on the faith of the husband's authority.

The true doctrine is, that contracts and agreements of married women in reference to their real estate, when not joined therein by their husbands, where such agreements is free from fraud, cannot be enforced at law or in equity. But where married women make such contracts or agreements by fraudulent means, and thus obtain inequitable advantages, a Court of Chancery will hold them estopped from setting up and relying on their coverture to retain the advantage. The Court will require them to execute and perform the contract, if executory, or prevent them from avoiding it if executed, or will compel them to place the other party *in statu quo* before they will be allowed to rescind or repudiate such agreements or contracts. Whether the one or the other form of relief will be granted, must depend upon the equities of the case.

Here, plaintiff in error, by fraudulently concealing her marriage, and by declaring she was a widow when asked the question by the agent of defendant in error, gained an inequitable and unjust advantage of defendant in error, if she shall be permitted to retain the money she thus obtained and also to recover the land. She must be held to pay the money, or a lien for the same will be enforced against the premises she professed to mortgage to secure its payment. She must be

held estopped from relying on her coverture to escape its payment.

We perceive no error in the record, and the decree of the Court below must be affirmed.

Decree affirmed.

Rosenthal *v.* Mayhugh, 33 Ohio St. 155; Reis *v.* Lawrence, 63 Cal. 129; Nixon *v.* Halley, 78 Ill. 611.

Disabilities Removed by Statute.

But so far as the disabilities of married women and infants to contract are removed by statute, so far will the doctrine of estoppel by deed or *in pais* apply.

SANDWICH MANUFACTURING CO. *v.* ZELLMER.

Supreme Court of Minnesota, 1892.

48 Minn. 408.

J. and F. Zellmer mortgaged land to plaintiff to secure a debt, both joining in the covenants of warranty. There was a prior mortgage of $700 on the land, which was foreclosed after plaintiff's mortgage was given, and the land not being redeemed, the plaintiff's lien was lost. But F. Zellmer, the wife, afterward acquired title to the same land, and plaintiff now claims that this after-acquired title inures to its benefit, and that its mortgage is again a valid lien on the land.

VANDERBURGH, J. On the 11th day of September, 1882, the defendants Julius Zellmer and Fredericke Zellmer, his wife, executed and delivered to the plaintiff the three several notes or contracts in writing described in the complaint, whereby they agreed to pay the plaintiff, in the aggregate, the sum of $488.29. They were given in consideration of, and to secure, the individual indebtedness to plaintiff of Julius Zellmer to that amount. They also, at the same time, duly executed the mortgage deed set up in the complaint, which instrument contained a covenant against prior incumbrances "except a mortgage of $700," and also a covenant for quiet enjoyment and possession, and "that the parties of the first part, Julius and Fredericke Zellmer, his wife, would warrant and defend the

title to the said premises against all lawful claims." At the time of the execution of the mortgage, which conveyed the northeast quarter (N. E. ¼) of section six (6), in township one hundred and one (101), range forty-five (45), including the homestead of the mortgagors, the defendant Julius was insolvent. The title to the land stood in his name, and the mortgage was given to secure his indebtedness above mentioned. There was a prior mortgage upon the premises, running to one Henry Zaun, for about $700, which is the incumbrance referred to in the mortgage to plaintiff. The last-named mortgage was foreclosed in 1885. The title passed under the foreclosure, and afterward the owner conveyed the same by deed to the defendant Fredericke Zellmer, subsequently recorded; and thereafter, in the year 1887, she, by deed of conveyance, in which her husband duly joined, conveyed the same premises to Herman Zellmer.

The question here presented is whether the defendant Fredericke, who expressly joined in the covenants in the mortgage to plaintiff, is bound thereby; for if she is liable thereon, or is estopped thereby, as if she had not been under coverture, the conveyance to her inured to the benefit of the plaintiff by virtue of her covenant, and its mortgage is operative as a valid subsisting lien upon the land, as against her and her assignee, Herman Zellmer. It is hardly necessary to refer to the nature of a married woman's disability at the common law. She was not bound by her contracts or covenants, and was not estopped thereby from setting up an after-acquired title. It was competent for the Legislature to emancipate her from such disability, and enable her to obligate herself as if unmarried. The question here involved turns upon the construction of the statute of this State touching the rights and liabilities of married women. Prior to the Act of 1869, ch. 56, the statute had secured to them their separate estate, real and personal, with the rents, profits, and income thereof. But she could not dispose thereof without the consent of her husband; and her general, common-law disability to make contracts remained: 1858 Pub. St., ch. 61, § 106, p. 571; Revision 1866, G. S., ch. 69, and ch. 40,

§ 2; Carpenter *v.* Leonard, 5 Minn. 163 (Gil. 119); Tullis *v.* Fridley, 9 Minn. 81 (Gil. 68). But the provisions of Laws, 1869, ch. 56, were radical and sweeping, and were intended, in respect to her contracts, to invest a married woman, not merely with the right to contract in respect to her separate property, but with all the rights and liabilities of a *feme sole*, save only as expressly excepted or reserved by the same statute. It was evidently the intention of the Legislature to define clearly the nature and extent of such rights and liabilities: Kingsley *v.* Gilman, 15 Minn. 59 (Gil. 40); Northwestern Mut. Life Ins. Co. *v.* Allis, 23 Minn. 337. This statute does not, of course, have any reference to the domestic relations, or affect the rules of evidence, or the duty of the husband to provide for his family, though the wife might obligate herself for such purpose: Flynn *v.* Messenger, 28 Minn. 208 (9 N. W. Rep. 759). In Northwestern Mut. Life Ins. Co. *v.* Allis, *supra*, the wife had mortgaged her separate real property to secure a debt of her husband, which was evidenced by their joint note. The mortgage was not only held valid, but she was held personally liable for the deficiency upon foreclosure by action. It was contended that she was not liable because of the provisions of section three (3), which exempted her from the debts of her husband: but the Court say (page 341): "To give this effect to the section would be to allow inference and conjecture to qualify and restrict the meaning of the clear and precise language of the Act removing the wife's common-law disability to contract. Section 2 provides that 'any married woman shall be capable of making any contract, either by parol or under seal, which she might make if unmarried, and shall be bound thereby.' Then follow clearly expressed exceptions to her power to contract without her husband, relating only to her real estate. Section 4 expressly retains the common-law disabilities of husband and wife to contract with each other relative to the real estate of either. . . . 'But in relation to all other subjects either may be constituted the agent of the other, or contract each with the other, as fully as if the relation of husband and wife did not exist.'" No doubt the

defendant in that case would have been bound upon her covenants in the mortgage as well as her husband, and a covenant of warranty would have passed an after-acquired title: Knight *v.* Thayer, 125 Mass. 27; Bigelow, Estop. (5th ed.) 406, 407; Kenworthy *v.* Sawyer, 125 Mass. 28; Goodnow *v.* Hill, Ib. 587.

In the case at bar the defendant Fredericke, as to the payee, the plaintiff, made the debt her own by signing the note. She joined in the mortgage of the quarter section, containing the homestead, to secure this debt. She also joined in the covenants therein, including the covenant of warranty. It is contended, however, that she is not bound by covenants in the mortgage, because she must be presumed to have joined in the mortgage solely for the purpose of releasing the homestead or dower interest in the land: and it is claimed that the authorities in other States, particularly Illinois, support this contention. But no consistent general rule can well be formulated under the varying statutes of the different States on the subject, in connection with local statutes regulating the conveyance of real estate. It is true the wife's signature was necessary to pass a perfect title; but she was under no disability whatever in the matter of the execution of a deed with covenants, or the acknowledgment thereof. Though described as wife, her acknowledgment, under the statute, is that of a *feme sole.* Her husband was insolvent, and her covenants would afford additional security to the plaintiff. She was legally competent to enter into such covenants, and upon the face of the deed appears to have done so. For all the purposes thereof it was her contract; and it seems to us it would be a strained and unreasonable construction to give the deed the limited effect contended for it. When a deed on its face purports to convey a restricted or partial interest in land, the covenants, though general, will be limited to such interest: Sweet *v.* Brown, 12 Met. (Mass.) 177. But where a deed assumes to convey the land, and the covenants are unrestricted, it is difficult to see how the Court can limit or apportion its application, if it gives any effect to it at all. Here (to repeat), it will be observed, the covenant reads, "and the said Julius Zellmer and Riecke Zell-

mer, his wife, parties to the first part, do covenant . . . that the said parties to the first part will warrant and defend the title to the said premises against all lawful claims." Dower is in the nature of an incumbrance. Is the covenant of the wife operative to estop her as against a claim of dower subsequently arising, or does the deed simply release her present right, and is the covenant of both operative as to the legal title and estate of which the husband is seised, or does her covenant, if it is operative at all, relate merely to her statutory interests as wife? In view of her capacity to bind herself by her covenants, if operative at all, we are of the opinion that the covenant referred to must be construed in its natural and broader, and not in the restricted, sense. In construing a similar statute in Massachusetts, the Court say: "The provision in the Act that nothing therein shall authorize her to convey property to, or make contracts with her husband, is evidently not intended to impose any new restriction on her capacity, but merely to affirm the common-law rule, so far as the husband is the other party to the contract or grant, but does not prevent both of them from binding themselves by a joint promise to a third person:" Major *v.* Holmes, 124 Mass. 108.

The Acts of 1875 and 1876, superseding dower, and making provisions in lieu thereof, place the husband and wife substantially on the same footing as respects rights in the real property of each other. Construed in connection with the homestead law, and the Act concerning married women of 1869, the case stands thus: In whichever one the title of the homestead may be, neither can convey the same without the other. The wife's signature is necessary to the deed of other lands belonging to the husband, in order to pass a clear title; and the husband must join in all conveyance of the wife's lands. In Iowa they have a statute (Code, § 1937) in respect to liability upon covenants in such deeds, which is as follows: "In cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance unless it is expressly so stated on the face thereof." We have no such

saving clause in our statute. Whether there ought to be is a matter addressed to the Legislature rather than to the Courts. In the absence of it, to attempt to place a limited construction upon such deeds, contrary to the fair and natural signification of the language used, is not warranted by the statute, or supported by sound reason. Mortgages frequently contain other express covenants than those relating to the title; as, for example, in this instance, to pay the debt or to pay taxes. Shall a married woman be bound by such covenants, and exempt from liability for the others? If she joins in all, there can be no reason why she should not be personally liable in all alike, since she is capable of so binding herself; and, if she is so liable they must operate by way of estoppel. The Courts are careful and conservative in the construction of statutes of this character, which are in derogation of the common law; but they cannot make exceptions and limitations which the statute does not warrant.

2. The disposition made of the question of the liability of Fredericke Zellmer upon the covenants in her husband's deed renders it necessary to consider the effect of the exception of the prior mortgage from the covenant against incumbrances upon her liability upon the covenant of warranty in the plaintiff's mortgage. The covenant runs in this way: "That the same is free from all incumbrances except a mortgage of seven hundred dollars;" but no other reference to that mortgage appears upon the face of the instrument. The question whether such an exception qualified or affected the covenant of warranty in the same deed was considered, but not finally decided, in Merritt *v.* Byers, 46 Minn. 74 (48 N. W. Rep. 417). Jackson *v.* Hoffman, 9 Cow. 273, is not in point; for there the grant was subject to the mortgage, so that all the covenants related to the estate as so incumbered. But in Bricker *v.* Bricker, 11 Ohio St. 240, the rule is laid down and approved that a preceding special covenant against incumbrances, which excludes the incumbrance complained of, is to be regarded as an exception of such incumbrance in the covenant of general warranty. This case is, however, not generally accepted as

authority, and the better opinion, following the reasoning of Lord ELLENBOROUGH, in Howell *v.* Richards, 11 East. 633, is that the covenant of warranty is not limited by the preceding restricted covenant against incumbrances. The two covenants are not connected, and are not of the same nature or import: Estabrook *v.* Smith, 6 Gray, 570; Ogden *v.* Ball, 40 Minn. 94 (41 N. W. Rep. 453). In Howell *v.* Richards, *supra*, it was held that a limited covenant for good title and good right to convey did not restrain or qualify the succeeding covenant for quiet enjoyment. The covenant for title and good right to convey are "connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of one may therefore properly enough be considered as virtually transferred to and included in the other; but the covenant for quiet enjoyment is of materially different import, and directed to a different end. . . . And it is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of the title which he purports to convey than for quiet enjoyment." The exception in the deed is notice of the incumbrance, and exempts the grantor from an action upon the particular covenant; and this is all the effect that can be given to it: Bennett *v.* Keehn, 67 Wis. 162 (29 N. W. Rep. 207, and 30 N. W. Rep. 112), and cases. A prudent grantor may desire that the deed shall state the truth—and he is obliged to give the grantee notice of an incumbrance (1878 G. S., ch. 40, § 34); and he may know or believe that the incumbrance will be removed before it ripens into a title which would be ground for an eviction, so that he might risk a warranty against an eviction, when he might be unwilling to take the risk of a present liability for a breach of the covenant against incumbrances. "The same prudence, therefore, which might require the qualification of one of these covenants, might not require the same qualification of the other, affected, as it is, by different considerations, and addressed to a different object:" Howell *v.* Richards, *supra*. If it is the wish or purpose of the grantor to make his con-

veyance subject to the mortgage, so as to affect and qualify all the covenants, or to accept an incumbrance from the covenant of warranty, it is very easy for him to do so; and no careful conveyancer would fail to make the exemption from all, as well as one, of the covenants of the deed, if it was the grantor's purpose to exempt himself from all liability. In Gerdine *v.* Menage, 41 Minn. 417 (43 N. W. Rep. 91), it was assumed that the exemption was general. Upon the point under consideration, reference is made to the authorities cited in Merritt *v.* Byers, *supra*, and also to Ruggles *v.* Barton, 16 Gray, 152.

Reversed and remanded.

Dobbin *v.* Cordiner, 41 Minn. 165; Knight *v.* Thayer, 125 Mass. 25.

But where by statute the husband must join the wife in her deed to make it valid, she will not be estopped by acts *in pais* to assert her title to realty: Behler *et ux. v.* Weyburn, 59 Ind. 143; Cook *v.* Walling, 117 Ind. 9, 2 L. R. A. 769.

Estoppel by Destruction of Deed.

The redelivery of a deed of land to the grantor does not revest the title in him. But if the grantee, with intent to revest the title, destroys or cancels the deed so that it cannot be used in evidence, such act operates, on the principle of estoppel, under the rules of evidence, as a reconveyance, so far as the grantee and his privies are concerned.

FARRAR *v.* FARRAR.

Supreme Judicial Court of New Hampshire, 1827.

4 N. H. 191.

In 1811 Isaac F. conveyed an undivided one-half of certain lands to one Pierce, who, to secure the purchase-price, reconveyed the same by mortgage to the grantor. In 1814, being unable to pay the notes, it was agreed by the parties that the notes should be surrendered and the bargain given up. In 1822 Isaac F. conveyed the whole land to Noah F., who, finding that the said mortgage was still in existence, brought this action against Isaac F. on the covenant of warranty.

RICHARDSON, C. J. It is well settled that the cancelling of a deed does not revest property which has once passed under it by transmutation of possession: Jackson *v.* Chase, 2 Johns.

84; Marshal *v.* Fisk, 6 Mass. Rep. 24; 4 Barnewell & A. 672; Doe *v.* Bingham, 3 D. & E. 156; 2 H. Black. 263; Woodward *v.* Aston, 1 Ventris, 296; Roe *v.* The Archbishop of York, 6 East, 86; Nelthorpe *v.* Dorrington, 2 Levintz, 113; Shep. Touch. 69–70.

And in all cases a mere agreement to cancel a deed without actually cancelling it is without effect. Thus Shepherd in his Touchstone, 70, says, "If an obligee deliver up an obligation to be cancelled and the obligor do not afterward cancel it, but the obligee happen to get it again into his hands and sue the obligor upon it, the obligor hath not any plea to avoid it, for the deed remains still in force."

So in Dana *v.* Newhall, 13 Mass. Rep. 498, it was held that an agreement to cancel a deed, by which real estate had passed, did not revest the estate.

In Cross *v.* Powell, Cro. Eliz. 483, it was held that "if a deed be delivered to be cancelled to the party himself, yet if it be not cancelled and the other gets it again, it remains a good deed."

There are, however, cases in which an actual cancelling of a deed by which land has passed will in effect revest the estate. Thus where A. being seised and possessed of land purchased by him of B., by a deed duly executed but not recorded, contracted to sell the land to C., and for that purpose cancelled B.'s deed, who, at A.'s request, made a new conveyance to C., it was holden that C.'s title was valid, notwithstanding A. continued in the occupation of the land jointly with C. after the last conveyance: Commonwealth *v.* Dudley, 10 Mass. Rep. 403.

So in Tomson *v.* Ward, 1 N. H. Rep. 9, it was held that an unrecorded deed of land, voluntarily given up and cancelled by the parties to it with intent to revest the estate in the grantor as between them and as to all subsequent claimants under them, operates as a reconveyance and revests the estate in the grantor.

It is apprehended that in these cases the cancelling of the deed operates like a reconveyance, but that it is not in fact to

be considered as such. The true ground on which these decisions are to be supported is that the grantee having voluntarily and without any misapprehension or mistake consented to the destruction of the deed with a view to revest the title, neither he nor any other person claiming by a title subsequently derived from him is to be permitted to show the contents of the deed so destroyed by parol evidence. So that in fact there being no competent evidence that the land ever passed, the title is to be considered as having always remained in the grantor.

Such being the law, the case now before us is easily settled. The deed from the defendant to Pierce not having been actually cancelled, remains in full force. The same is true of the mortgage from Pierce to the defendant. The notes given by Pierce for the land and secured by the mortgage having been given up and cancelled under a misapprehension that the title to the land was revested absolutely in the defendant, they still remain due. It is then very clear that the defendant was seised of the land at the time he conveyed to the plaintiff.

The right of Pierce's heirs to redeem may be an incumbrance, for which the plaintiff may have a remedy, if his deed contains a proper covenant for the purpose, whenever he shall have extinguished that right. But in this action we are of opinion that there must be judgment on the verdict.

Parker *v.* Kane, 4 Wis. 12; Bank *v.* Eastman, 44 N. H. 438; Commonwealth *v.* Dudley, 10 Mass. 403; Howe *v.* Wilder, 11 Gray, 267; Speer *v.* Speer, 7 Ind. 178; Blake *v.* Fash, 44 Ill. 305; Rogers *v.* Rogers, 53 Wis. 36.

While the grantee cannot prove his title, having destroyed his deed, his creditors may; hence, as to them, the title is in the grantee: Wilke *v.* Wilke, 28 Wis. 296; Blaney *v.* Hanks, 14 Iowa, 400. See further: Wilson *v.* Hill, 13 N. J. Eq. 143; Gilbert *v.* Bulkley, 5 Conn. 262; Hall *v.* McDuff, 24 Me. 312.

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The State.

The State may acquire title to realty under two distinct powers: (1) Eminent domain; (2) Taxation.

Eminent Domain.

Private property may be taken by the State for public use, but not without just compensation to the owner.—*U. S. Const., Fifth Amendment.—Minn. Const., Art. I, § 13.*

BOOM CO. *v.* PATTERSON.

Supreme Court of the United States, 1878.

98 U. S. 403.

Mr. Justice FIELD. The plaintiff in error is a corporation created under the laws of Minnesota to construct booms between certain designated points on the Mississippi and Rum Rivers in that State. It is authorized to enter upon and occupy any land necessary for properly conducting its business; and, where such land is private property, to apply to the District Court of the county in which it is situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. It is unnecessary to state in detail the various steps required to obtain the condemnation. It is sufficient to observe that the law is framed so as to give proper notice to the owners of the land, and secure a fair appraisement of its value. If the award of the commissioners should not be satisfactory to the company, or to any one claiming an interest in the land, an appeal may be taken to the District Court, where it is to be entered by the clerk "as a case upon the docket" of the Court, the persons claiming an interest in the land being designated as plaintiffs, and the company seeking its condemnation as defendant. The Court is then required to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said Court." Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed

by the jury or the Court, as the case may be, the amount of the assessment is to be entered as a judgment against the company, which is subject to review by the Supreme Court of the State on a writ of error.

The defendant in error, Patterson, was the owner in fee of an entire island and parts of two other islands in the Mississippi River, above the Falls of St. Anthony, in the county of Anoka, in Minnesota. These islands formed a line of shore, with occasional breaks, for nearly a mile parallel with the west bank of the river, and distant from it about one-eighth of a mile. The land owned by him amounted to a little over thirty-four acres, and embraced the entire line of shore of the three islands, with the exception of about three rods. The position of the islands specially fitted them, in connection with the west bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty millions of feet of logs. All that was required to form a boom a mile in length and one-eighth of a mile in width was to connect the islands with each other, and the lower end of the island farthest down the river with the west bank; and this connection could be readily made by boom sticks and piers.

The land on these islands owned by the defendant in error the company sought to condemn for its uses; and upon its application commissioners were appointed by the District Court to appraise its value. They awarded to the owner the sum of $3,000. The company and the owner both appealed from this award. When the case was brought before the District Court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the Circuit Court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at $9,358.33; but accompanied it with a special verdict assessing its value aside from any consideration of its value for boom purposes at $300, and, in view of its adaptability for those purposes, a further and additional value of $9,058.33. The company moved for a new trial, and the Court granted the motion, unless the owner would elect to reduce the verdict to $5,500. The owner made this election,

and judgment was thereupon entered in his favor for the reduced amount. To review this judgment the company has brought the case here on a writ of error.

The only question on which there was any contention in the Circuit Court was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. But the company now raise a further question as to the jurisdiction of the Circuit Court. Objections to the jurisdiction of the Court below, when they go to the subject-matter of the controversy, and not to the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower Court.

The position of the company on this head of jurisdiction is this: That the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an Act of the Legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the Courts

between parties—the owners of the land on the one side, and the company seeking the appropriation on the other—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court: Turner *v.* Halloran, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the Courts of law for its value. That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed.

The Act of March 3, 1875, provides that any suit of a civil nature, at law or in equity, pending or brought in a State Court, in which there is a controversy between citizens of different States, may be removed by either party into the Circuit Court of the United States for the proper district; and it has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the State under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States: Paul *v.* Virginia, 8 Wall. 177. And in Gaines *v.* Fuentes, 92 U. S. 20, it was held that a controversy between

citizens is involved in a suit whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation and is presented by the pleadings for judicial determination. Within the meaning of these decisions, we think the case at bar was properly transferred to the Circuit Court, and that it had jurisdiction to determine the controversy.

Upon the question litigated in the Court below, the compensation which the owner of the land condemned was entitled to receive, and the principle upon which the compensation should be estimated, there is less difficulty. In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the

lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands.

We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. The clause in its charter authorizing and requiring it to receive and take the entire control and management of all logs and timber to be conveyed to any point on the Mississippi River must be held to apply to the logs and timber of parties consenting to such control and management, not to logs and timber of parties choosing to keep the control and management of them in their own hands. The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners. Whilst in Atlee *v.* Packet Company, 21 Wall. 389, we held that a pier obstructing navigation, erected in the river as part of a boom, without license or authority of any kind except such as arises from the ownership of the adjacent shore, was an unlawful structure, we did not mean to intimate that the owner of land on the Mississippi could not have a boom adjoining it for the reception of logs of his own or of others, if he did not thereby impede the free navigation of the stream. Aside from this, we do not think that the State is precluded by anything in the charter of the company from giving a license to the defendant in error to construct a boom near his lands. Moreover, the United States, having paramount control over the river, may grant such license if the State should refuse one. The adaptability of the lands for the purpose of a boom was, therefore, a proper element for consideration in estimating the value of the lands con-

demned. The contention on the part of the plaintiff in error is, that such adaptability should not be considered, assuming that this adaptability could never be made available by other persons, by reason of its supposed exclusive privileges; in other words, that by the grant of exclusive privileges to the company the owner is deprived of the value which the lands, by their adaptability for boom purposes, previously possessed, and therefore should not now receive anything from the company on account of such adaptability upon a condemnation of the lands. We do not think that the owner, by the charter of the company, lost this element of value in his property.

The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, In the Matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the city of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was, "What is the value of the property for the most advantageous uses to which it may be applied?" In Goodwin *v.* Cincinnati & Whitewater Canal Co., 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or any other particular use, but generally for any and all uses for which it might be suitable. And in Young *v.* Harrison, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the commuuity. Its value as a bridge site was, therefore,

allowed in the estimate of compensation to be awarded to the owner.

These views dispose of the principle upon which the several exceptions by the plaintiff in error to the rulings of the Court below in giving and in refusing instructions to the jury were taken, and we do not deem it important, therefore, to comment upon them.

Judgment affirmed.

Fee Simple.

The State may take the fee simple or a lesser interest.

SWEET *v.* BUFFALO ETC. CO.

Court of Appeals, New York, 1879.

79 N. Y. 293.

The plaintiff brings an action of ejectment to recover possession of certain lands.

ANDREWS, J. The right of the plaintiff to recover in this action depends upon the question whether the city of Buffalo by the proceedings taken under chapter 547 of the Laws of 1864 became vested with the fee of the land in controversy. If the title of the plaintiff's grantor was divested by the proceedings under the Act the deed to the plaintiff conveyed no title or interest in the premises and he cannot maintain ejectment, and it is wholly immaterial whether the license from the Common Council of the city, under which the defendant entered upon and laid its track over the *locus in quo* was or was not valid. The plaintiff must recover on the strength of his own title, and if he has none, the question of the defendant's title is unimportant.

The Act referred to is entitled "An Act authorizing the Common Council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie."

The first section authorizes the Common Council to lay out, make and open a public ground one hundred and thirty feet wide along the shore or margin of Lake Erie for the purpose of maintaining thereon and protecting a sea-wall or breakwater and to take and appropriate for that purpose certain specified lands including the premises in controversy. It provides that the land shall be "taken and appropriated" in the same manner and that compensation therefor shall be ascertained and made as provided in the charter of the city in proceedings for the taking of land for laying out streets and highways therein. Upon payment or tender of the compensation awarded to the owner or owners of the land taken, the section declares that "the fee thereof shall vest in the city of Buffalo for the purpose aforesaid and thenceforth the said land shall be and remain a public ground for the purpose of maintaining and protecting thereon or any part thereof a sea-wall or breakwater and protecting the harbor of said city and the lands adjacent from the encroachments of said lake," and that nothing in the Act contained shall prevent the city from acquiring title to the lands described therein, for the purpose stated, by voluntary conveyance from the owner.

The second section provides that when the city shall have obtained "title to the land," either by proceedings under the Act or by voluntary conveyance as therein authorized, "the said land shall be subject to the control of the Common Council of said city as one of the public grounds thereof, except so far as said control may have been heretofore or may be hereafter ceded to the United States," and it authorizes the Common Council to direct a deed or deeds of conveyance of such land, or any part thereof, to be made in the name of and under the corporate seal of the city to the United States, "for the purpose of erecting and maintaining thereon a sea-wall or breakwater," on condition, to be expressed therein, that the United States shall maintain and keep in repair on said land the said sea-wall or breakwater; and the section declares that "the execution and delivery of the deed or deeds shall vest in the United States the title to the land for the purpose and

subject to the condition aforesaid." The third section prohibits the removal by any person from the premises of any earth, sand, or gravel after the lands shall have been conveyed to or taken by the city under the Act, without permission of the Common Council or the United States, as the case may be, or any excavation thereon so as to impair or injuriously affect the sea-wall or breakwater, and makes it a misdemeanor for any person willfully to tear down or remove any part thereof. The fourth section prohibits the erection of any building on the premises taken or conveyed under the Act, and makes it a misdemeanor for any person after the land shall have been appropriated by or conveyed to the city to erect upon or move on to said land any building. The fifth section authorizes the Common Council to pass ordinances to prevent the erection or placing of any building on the land, or the taking of any earth, sand, or gravel therefrom, and for the protection of the sea-wall or breakwater, and to impose penalties for a violation thereof. The sixth section requires the Common Council upon perfecting the proceedings for taking and appropriating the lands, or upon conveyance thereof, to declare by resolution "the said land to be a public ground for the purpose of maintaining and protecting a sea-wall or breakwater."

It is conceded that proceedings were instituted under this Act to take the lands in question, and that by virtue of such proceedings all the interest in the premises in question which the city could acquire thereby became vested in the city. There is therefore no question of regularity to be considered, and it is to be assumed that compensation has been made or tendered to the owner of the land to the full extent authorized by the Act. It is claimed, however, that under the Act and proceedings thereunder the city acquired an easement only in the premises for the purpose of maintaining a sea-wall or breakwater, and that the fee of the land remained in the owner subject to this servitude.

This position, if it can be maintained, must rest upon the ground that it was not the intention of the Act that a fee should be acquired by the city in the premises taken, and

not upon the ground that there was any lack of power in the Legislature to authorize the acquisition by the city by compulsory proceedings of the fee of the land for the use mentioned in the Act. The use was unquestionably a public one, and it is well settled that it is within the competency of the Legislature in authorizing land to be condemned for a public use which may be permanent, to determine what estate shall be taken, and to authorize the taking of a fee or any lesser estate in its discretion, and that a fee may be taken although the public use for which the land is to be taken is special and is not of necessity permanent or perpetual: Heyward *v.* The Mayor, etc., 7 N. Y. 214; Rexford *v.* Knight, 11 Ib. 308; Brooklyn Park Comrs. *v.* Armstrong, 45 Ib. 234. It is true as claimed by the plaintiff's counsel that Acts authorizing the taking of private property for public use are to be strictly construed and will not be deemed to justify the taking of any greater estate or interest than such as is expressly, or by necessary implication authorized by the statute under which the application is made: The Washington Cemetery *v.* Prospect Park R. R. Co., 68 N. Y. 591; Sixth Avenue R. R. Co. *v.* Kerr, 72 Ib. 530. But there is no other restraint upon the power of the Legislature to authorize land to be taken for public use, except that which imposes the condition of making compensation to the owners. When the statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired by proceedings thereunder, on the ground that in the judgment of the Court the taking of an easement only would accomplish the public purpose which the Legislature had in view. That is a legislative and not a judicial question.

It seems very plain that the Legislature intended by the Act in question to authorize the city of Buffalo to acquire by proceedings under the Act the fee of the premises described therein. The lands are to be "taken and appropriated" for a use continuous and permanent in its character. The compensation is to be ascertained in the same manner as the compensation for lands taken by the city for streets and highways in which cases as the charter then was, the fee was taken, and

there can be no question that the commissioners under the Act of 1864 were authorized and required to award the full value of the land taken. The Act declares that upon the payment or tender of the compensation award for the lands taken "the fee thereof shall vest in the city," and the city, "after title to the land shall have been acquired," is authorized to convey to the "United States the said land or any part thereof." It is impossible in view of the clear and unambiguous terms of the statute, which vests in the city a fee in the lands taken under the Act and the right to convey under the limitations mentioned, and provides for the payment to the owner of the full value of his property, to sustain the contention of the plaintiff that the city took an easement only, which is not a title or estate in land but a mere privilege therein distinct from any ownership of the soil. It is claimed that the interest taken by the city is for a special purpose, to wit: the maintaining and protecting of a sea-wall, and this purpose is repeatedly declared in the Act. But we perceive no inconsistency in declaring the particular use for which the city is to take and hold the land, and at the same time providing that it should take a fee. The particular use declared is in the nature of a trust engrafted on the fee, and the people through its proper officers could compel the city to observe the trust, or restrain it from any use of the land inconsistent with it. The purpose expressed does not qualify the estate taken but simply regulates and defines the use for which it shall be held. The argument that the Act makes provision for the protection of the property and authorizes the Common Council to do certain things which it would be unnecessary to provide for if the city became the general owner is not, we think, entitled to much weight, in view of the explicit declaration of the Act that the fee of the land acquired under the Act should vest in the city. The principle of construction that authorizes the examination of an entire statute or instrument to ascertain the meaning of any part, when the meaning is ambiguous or obscure, is well settled, but in this case there is no need of construction. The word *fee* has a clear, definite, and legal

signification, and is wholly inconsistent with the claim that an easement in the land only was authorized to be taken.

The objection that the Act is void under section 16 of article III of the Constitution is not well taken. The title, we think, sufficiently indicated the subject of the Act. It would be expected that in an Act authorizing a municipal corporation to lay out a public ground provisions would be found for condemning land for that purpose. The conclusion is that the plaintiff failed to establish any right or title to the premises in question and the judgment must therefore be affirmed.

Judgment affirmed.

Cotton *v.* Miss. & Rum River Boom Co., 22 Minn. 372; Scott *v.* St. P. & C. Ry. Co., 21 Minn. 322.

Taxation.

The State may, under the power of taxation, sell and convey the title to land in fee simple or lesser interest in default of payment of taxes assessed thereon.

DOE *ex dem.* GLEDNEY *v.* DEAVORS.

Supreme Court of Georgia, 1850.

8 Ga. 479.

NISBET, J. 1. This was an action of ejectment. The plaintiff claimed under a tax collector's deed, and the defendant under a sheriff's deed. The sheriff's deed bears date in April, 1841, and the tax collector's deed in December of the same year. The sheriff sold the land under an execution in favor of a citizen, as the property of the defendant in execution. The collector caused the same land to be sold for the taxes due by the same defendant, assessed for that year. The question of title being before the Circuit Court, the presiding Judge instructed the jury, "that the lien or security of the State, for the tax due from the defendant in execution for the year 1841, was destroyed by the sheriff's sale, and the subsequent sale conveyed no title, unless the jury believed that the

sheriff's sale was made for the purpose of avoiding the payment of taxes due, and that the only preference that existed for said tax, was the right of the tax collector to claim out of the fund raised by the sheriff's sale." To this charge the plaintiff in error excepted, and the question is, whether the tax due by a citizen is a lien upon his property, which can be enforced by a re-sale, in a case like this, where the property has been sold under a general judgment before it is returned, yet after the tax upon it has been imposed by law. The presiding Judge does not seem to hold, that generally taxes are not a lien, but believes that the lien was destroyed by the sheriff's sale, and that after such sale, the only way in which the State can collect her taxes, is by putting in a claim upon the fund. Inasmuch as the land had been sold, the view of the Judge seems to be, that the State occupied the position of a favored or preferred claimant on it, and failing to assert her claim, lost it, unless the sale by the sheriff was intended to defeat the payment of the taxes. The question is an important one, and it will be necessary to consider, generally, the question, to what extent assessed taxes are a lien upon the property of the citizen, and if they are a lien particularly, whether in this case it was, as held by the presiding Judge, destroyed by the sale by the sheriff. The right to tax the whole property of the citizen for the defense of the State and the support of the government, is not a questionable proposition. It is an incident of sovereignty. All property which vests in the citizen by grant from the estate, is liable to taxation, without a reservation of the right to tax. That right grows out of the right of the citizen to governmental protection and the corresponding obligation of the government to protect him. *Revenue* is indispensable to the maintenance of all the privileges and immunities of the people—it is also indispensable to national independence, without which individual immunities and privileges are valueless. Hence it is, that in the very nature of the social compact, as a basis upon which the foundations of government are laid, the property of the citizen is pledged for these purposes—pledged without any

express declaration of a pledge. In the act of organizing a government, the pledge is implied. It is one of the elements of national being. The people who make a government, *ipso facto*, assent to it. This inherent right to lay and collect taxes, may be limited and regulated by the fundamental law, as it is by the Constitution of our Union. The amount and the mode of assessment, and the manner of collecting it, lies within the legislative competency, to be arranged from time to time, by law, according to the public exigencies. In this country the people impose the taxes which they pay, through their representatives, and the taxing power is not, therefore, likely to be abused. Upon these principles, it has been held, in a sister State, that the taxes due, in the absence of any legislative declaration upon that subject, are a mortgage to the exclusion of any other lien or incumbrance. The decision goes upon the idea, that the obligation to support the government precedes and is paramount to every contract between citizens; and without amplifying this general doctrine, I leave it with my concurrence: 2 Bay's Rep. 244; 4 Peter's R. 514; 4 Wheat. 428.

However sufficient these principles may be to sustain the tax lien, we are not left to them alone. In our judgment, the laws of the State give to assessed taxes a lien which overrides every other security or incumbrance. By the 14th section of the Act of 1804, which is still of force, it is declared, that "the taxes imposed by this Act shall be preferred to all securities and incumbrances whatever:" Prince, 847. This section creates a lien. It is argued that it only gives a preference or creates a *grade* of debt, in contemplation of a contest with other securities and incumbrances. Our opinion is, that it creates a general lien, which attaches at the time when the property is liable by law to taxation, upon all the property of the citizen. It is true that the phraseology of the Act might have been more plainly declaratory of a lien. But what is its effect? A legal preference, that is priority, is given to the taxes, not only over all incumbrances whatever—such as mortgages and judgments—but also over all *securities*—securi-

ties by title, as well as other securities. A deed, therefore, upon private sale will not defeat the preference. It inhibits a sale to the exclusion of the taxes. And it can only defeat the security of a deed, upon the idea of a lien on the property. If a title by deed, upon private sale, will not defeat the tax lien, a title by deed upon a judicial sale will not, *a fortiori*; for, the lien of the judgment, under which the purchaser at the judicial sale gets his title, is unquestionably postponed by the Act. There is no particular form of words necessary to create a lien. The plain import of this Act is a legal preference for satisfaction *out of the property* of the person taxed, over every security and every incumbrance, and that is a lien. The Legislature, no doubt, intended simply to declare the great fundamental principle, that the *property* of the citizen is pledged to the exclusion of all private contracts—to the support of the government. That principle elucidates the enactment. If the lien exists without a legislative declaration—if it be an elementary principle of government, recognized by the ablest statesmen, it can hardly be presumed that the Legislature intended to innovate upon and weaken it. If the Act only creates a preference over other claims, it is available for the protection of the State, only when a citizen is dead and his estate is for distribution, or when he is insolvent, or when there is a fund in hand for distribution. Upon this idea, it looks to marshaling assets. And in case of the alienation, *bona fide*, of property by private sale, this construction would wholly defeat the security of the State. In this very case, as I shall show, it would defeat the collection of taxes altogether. I do not mean to say, that when the money of the citizen is in the hands of the Court, and the tax is in a situation to be presented as a claim upon it, that that claim would not be good. If the Act creates a lien on property, the lien equally attaches upon its proceeds. But in such a case, I do not believe that the lien of the State would be lost by its agent failing to put in a claim upon the fund, upon the principle that no *laches* can be imputed to the State. It is not enough to say, that the collector and his security would be in that case liable,

for that liability is only cumulative security for the State. The lien is a general one. The whole property is bound for the taxes. That it is not confined to the specific property upon which each item of the tax arises, is manifest in this. The law requires the personal estate first to be sold to pay the tax, and if none, or not enough, then the real estate. Accordingly, taxes originating on lands may be paid out of the personal estate, and *vice versa*. It takes effect when, by law, in each and every year the property is made taxable—that is to say, on the 1st of January. It is the imposition of the tax by law which appropriates, if needs be, the property of the citizen to the public use. The lien, therefore, does not commence only with the return of the property, or with the return of the digest by the receiver to the collector, or with the issuing of execution to enforce payment: Dudley, 15; 8 Watts & Searg. R. 449.

It is argued that the taxes are not a lien, from certain provisions of the tax law—such as that which declares all sales, made to prevent their payment, void—that which makes them first to be paid, in case of the death of the debtor, and charges the administrator, personally—and that which charges the mortgagee with the tax due upon the mortgaged property. These provisions of law do not set aside the lien created by the 14th section, nor are they incompatible with it. Some of them, it may be, are unnecessary—as for example, that which declares void all gifts and conveyances, etc., made to avoid the payment of taxes. If there is a lien, this provision is useless. All these things, and others—for example, the summary process with which the collector is armed to collect, and the prohibition of all judicial interference between the State and the debtor, look to the same end, and that is the *prompt and necessary* payment of the taxes. The State must have her revenue, at all hazards. Hence these various stringent provisions of law to constrain payment. Prompt collection is as necessary as the lien. But if, in all cases of sale of the property, as here, the State is to rely upon the fund, she may be delayed by litigation, and is really made

dependent upon judicial interference. She must put in her notice, or file her injunction—await the regular time for a hearing—abide delays, continuances, and collateral issues. In short, she is no better off than any other judgment creditor. No. To collect taxes, the State moves with uncontrollable power directly and instantaneously upon the property; and if, in the exercise of this stern but necessary attribute of sovereignty, the citizen is injured, his only redress is by petition to the Legislature.

2. In the case made in this record, if the doctrine of the Court prevails, and in all like cases, the tax will be lost to the State. Here the sheriff sold in April. The land sold was taxable on the 1st of January preceding. At the time of sale, the land had not been returned to the receiver—the collector knew not that it was taxable as the property of the defendant—he had no power over it—he could put in no notice to retain—he could institute no process to hold up the fund. The sheriff, officially, could know nothing of the claim of the State for taxes. He was not restrained from paying over at once the proceeds of the sale to the judgment in his hands; and if paid, then all means of security to the State is lost forever. The collector and his sureties would not be liable, for he could not be in default. So it would be in any case where there is a *bona fide* sale of property intervening the first of January and the return of the digest of taxes to the collector, whether that sale be private or judicial. The consequence of this doctrine would clearly be a loss to the State of no inconsiderable amount of her revenue, and a serious injustice to the tax paying portion of the people.

In the case before me, the collector has pursued the course which the law points out. When the tax was collectible, and default in payment made, he issued his execution—the land is levied on and sold. The question put by one of the counsel for plaintiff in error (Col. Brown), is conclusive of the case. If these proceedings are authorized by law (and that they are, no none questions), *does not the purchaser get a title?* If he does not, then the State has devised an ingenious piece of

statutory mechanism, for the purpose of entrapping her citizens. The previous purchaser has no right to complain, for the tax lien is by public law, and he is presumed to buy with notice.

In the argument of this cause, the defendant in error relied upon the decision of the Supreme Court of the United States in Conrad *v.* The Atlantic Insurance Company of New York, 1 Peters, 386. That decision places a construction on the 65th section of the Act of Congress, passed in 1799, which is as follows: "In all cases of insolvency, or when any estate in the hands of executors, administrators, and assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied; and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied and paid, shall be answerable in their own person and estate, etc." The Supreme Court held, that the priority, thus limited in behalf of the United States, was not a right that superseded and overruled an assignment made by the debtor, and subjected the property so assigned to execution; but was a right of prior payment out of the general funds of the debtor, in the hands of the assignee. This decision is inapplicable to the present case. A similar provision of law is made in this State when a debtor for taxes dies between the time of giving in his taxes and the payment. A *priority* is created in behalf of the State for the tax, and the administrator is bound to respect that priority, at the peril of personal liability: Prince, 847. If this were the only provision of our law on the subject, the question would be very different. We should construe it as the Supreme Court did, a like law of Congress, as giving a right only of prior payment. But it is not. In the same section, the Legislature declares that the taxes shall be preferred to all securities and incumbrances whatever. As before stated, the priority given in case of death, is cumulative, and intended to secure prompt payment of taxes. The law of

Congress does not pretend to give to the United States a lien—it only pretends to create a preference in the *cases stated*, of *insolvency*, etc. It cannot be enlarged beyond its terms. Our law, in general terms, conveys a preference over all *incumbrances and securities*, and, as we think, creates a lien.

Let the judgment be reversed.

Tax Deed.

WOOD *v.* ARMOUR.

Supreme Court of Wisconsin, 1894.

88 Wis. 488; 60 N. W. Rep. 791.

In 1850 Mann owned certain land in fee, which he then conveyed to Wood, of New York. Wood died in 1864, still owner of the land. The plaintiff in this action is his widow. In 1856 Mann went into possession of the land, either adversely or by permission, which fact is in dispute. Mann remained in possession until 1887. He paid taxes till 1877. The land was sold for taxes in 1883 and 1884, and tax deeds, fair on their face, were issued to one Parks. In 1887 Mann's wife bought these tax deeds with money of her own, and took the rents and profits of the land, made repairs, redeemed some unpaid taxes, and paid current taxes thereon, her husband acting as her agent. In 1892 Mrs. Mann conveyed the title to one Morse, and he conveyed it to Armour, the defendant. Mrs. Woods brings an action of ejectment, claiming that Mrs. Mann acquired no title, either by adverse possession or by the tax deed.

WINSLOW, J. The record is quite voluminous. The foregoing statement does not state all of the facts which appear in evidence, but it is believed that it states all the facts which are material to the decision of the case. The question was much discussed, both in the briefs and in the argument, whether Curtis Mann's entry and subsequent possession were adverse. In the view we have taken of the case, we find it unnecessary to decide the question. When the tax deed was executed the title to the property was either in the plaintiffs or in Curtis Mann, and in either event it was entirely competent for Nancy Mann, out of her separate estate, to purchase that tax title. The tax deeds were fair on their face. No ir-

regularity is shown or claimed in the levy of the tax upon which they were based. Hence, they conveyed a title in fee simple, unless there was some legal reason why Nancy Mann could not purchase that title.

It is suggested that Curtis Mann could not acquire the tax title, because he was in possession of the land and it was assessed to him, so that he was under legal obligation to pay the taxes. However much force this argument might have against a title acquired by Curtis Mann, or by a third person collusively for Mann's benefit, it has no force against Mrs. Mann, who was not in possession and was under no obligation to protect the title. No duty rested on her to pay the taxes on these lands, whether they belonged to her husband or to the plaintiffs. She had a separate estate, and if she chose to use a part of it in purchasing a tax title on these lands in good faith and for her own benefit, we know of no rule, in the present state of the law as to the property rights of married women, which would prevent her from doing so. The evidence showed, and the Court rightly found, that after such purchase she went into possession of the lands in question, and held such possession until she conveyed the same to the defendant's grantor. The actual manual possession during this time was in tenants, but we think the possession of these tenants, under the facts, must be held to be the possession of Mrs. Mann. She received the rents and profits, built fences, repaired buildings, paid the taxes, and managed the property as her own. It is true that her husband acted as her agent in many of these matters, but it is entirely competent for the husband to so act in the transaction of his wife's separate business, and we do not see how this is to prejudice the wife's rights. Certainly, no one has had possession adverse to her since she acquired title. The plaintiffs have not, and her husband has not, nor have the tenants. She put her title on record at once, thus announcing to all the world, including the plaintiffs, that she claimed title to the premises. This constituted not only a "challenge of the right of the original owner and all opposing claimants, but it was notice to them

of its existence and presumed validity:" Knox *v.* Cleveland, 13 Wis. 245.

In any view which we have been able to take of the case we have been unable to see why the tax title acquired by Nancy Mann did not vest in her a perfect title to the property, which is now vested in the defendant, her grantee.

Judgment affirmed.

The several States of the Union regulate the method of taking and determine the interest that shall pass under a tax sale: 2 Blackwell on Tax Titles, § 965; McFadden *v.* Goff, 32 Kan. 36; 4 Pac. Rep. 841; Parker *v.* Baxter, 2 Gray, 185; Sinclair *v.* Larned, 51 Mich. 335; Jones *v.* Devore, 8 Ohio St. 430; Brown *v.* Austin, 41 Vt. 262; Turner *v.* Smith, 14 Wall. 553; Sumner *v.* Kanawha Co., 26 W. Va. 159; Jackson *v.* Babcock, 16 N. Y. 246; Jarvis *v.* Peck, 19 Wis. 84.

h

Forfeiture.

Title to land may be lost to one and vest in another by virtue of statutes providing punishment for illegal acts.

Wallach *v.* Van Riswick.

Supreme Court of the United States, 1875.

92 U. S. 202.

The complainants were the children of Charles S. Wallach, a Confederate officer in the war of 1861. His estate in Washington, D. C., was seized under the Confiscation Act of July 17, 1862, condemned according to law, and sold to Van Riswick. After the war, in 1866, Wallach conveyed to Van Riswick all of his supposed interest in the land, and afterward died. Wallach's children began a suit, claiming that after the seizure of the land by the government no interest remained in their father, and that they, as his heirs, were entitled to the land. Van Riswick demurred, and his demurrer was sustained; hence this appeal.

Mr. Justice Strong. The formal objections to the bill deserve but a passing notice. It is not, we think, multifarious; and all persons are made parties to it who can be concluded or affected by any decree that may be made—all persons who have an interest in the subject-matter of the controversy. The main ques-

tion raised by the demurrer, and that which has been principally argued, is, whether, after an adjudicated forfeiture and sale of an enemy's land under the Confiscation Act of Congress of July 17, 1862, and the joint resolution of even date therewith, there is left in him any interest which he can convey by deed.

The Act of July 17, 1862, is an Act for the confiscation of enemies' property. Its purpose as well as its justification, was to strengthen the government, and to enfeeble the public enemy by taking from the adherents of that enemy the power to use their property in aid of the hostile cause: Miller *v.* United States, 11 Wall. 268. With such a purpose, it is incredible that Congress, while providing for the confiscation of an enemy's land, intended to leave in that enemy a vested interest therein, which he might sell, and with the proceeds of which he might aid in carrying on the war against the government. The statute indicates no such intention. The contrary is plainly manifested. The 5th section enacted that it should be the duty of the President of the United States to cause the seizure of "*all the estate and property, moneys, stocks, credits, and effects,*" of the persons thereinafter described (of whom Charles S. Wallach was one), and to apply the same and the proceeds thereof to the support of the army of the United States; and it declared that all sales, transfers, and conveyances of any such property should be null and void. The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner—all his estate or ownership. No authority is given to seize less than the whole. The 7th section of the Act enacted that to secure the condemnation and sale of any such property (viz.: the property seized), so that it might be made available for the purpose aforesaid, proceedings should be instituted in the Court of the United States; and if said property should be found to have belonged to a person engaged in the rebellion, or who had given aid or comfort thereto, the same should be condemned as enemies' property, and become the property of the United States, and might be disposed of as the Court should decree, the proceeds thereof

to be paid into the treasury of the United States for the purpose aforesaid. Nothing can be plainer than that the condemnation and sale of the identical property seized were intended by Congress; and it was expressly declared that the seizure ordered should be of all the estate and property of the persons designated in the Act. If, therefore, the question before us were to be answered in view of the proper construction of the Act of July 17, 1862, alone, there could be no doubt that the seizure, condemnation, and sale of Charles S. Wallach's estate in the lot in controversy left in him no estate or interest of any description which he could convey by deed, and no power which he could exercise in favor of another. This we understand to be substantially conceded on behalf of the defendant.

But the Act of 1862 is not to be construed exclusively by itself. Contemporaneously with its approval, a joint resolution was passed by Congress, and approved, explanatory of some of its provisions, and declaring that "no proceedings under said Act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." The Act and the joint resolution are doubtless to be construed as one Act, precisely as if the latter had been introduced into the former as a proviso. The reasons that induced the passage of the resolution are well known. It was doubted by some, even in high places, whether Congress had power to enact that any forfeiture of the land of a rebel should extend or operate beyond his life. The doubt was founded on the provision of the Constitution, in § 3, art. III, that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted." It was not doubted that Congress might provide for forfeitures effective during the life of an offender. The doubt related to the possible duration of a forfeiture, not to the thing forfeited, or to the extent and efficacy of the forfeiture while it continued. It was to meet the doubt which did exist that the resolution was adopted. What, then, is its effect? and what was intended by it? Plainly it should be so construed as to leave it in accord with the general and leading purpose of the Act of which it is substantially a

part; for its object was, not to defeat, but to qualify. That purpose, as we have said, was to take away from an adherent of a public enemy his property, and thus deprive him of the means by which he could aid that enemy. But that purpose was thwarted, partially at least, by the resolution, if it meant to leave a portion, and often much the larger portion, of the estate still vested in the enemy's adherent. If, notwithstanding an adjudicated forfeiture of his land and a sale thereof, he was still seized of an estate expectant on the determination of a life-estate which he could sell and convey, his power to aid the public enemy thereby remained. It cannot be said that such was the intention of Congress. The residue, if there was any, was equally subject to seizure, condemnation, and sale with the particular estate that preceded it. It is to be observed that the joint resolution made no attempt to divide the estate confiscated into one for life, and another in fee. It did not say that the forfeiture shall be of a life-estate only, or of the possession and enjoyment of the property for life. Its language is, "No proceedings shall work a forfeiture beyond the life of the offender;" not beyond the life *estate* of the offender. The obvious meaning is that the proceedings for condemnation and sale shall not affect the ownership of the property after the termination of the offender's natural life. After his death, the land shall pass or be owned as if it had not been forfeited. Nothing warrants the belief that it was intended that, while the forfeiture lasts, it should not be complete; viz.: a devolution upon the United States of the offender's entire right. The words of the resolution are not exactly those of the constitutional ordinance; but both have the same meaning, and both seek to limit the extent of forfeitures. In adopting the resolution, Congress manifestly had the constitutional ordinance in view; and there is no reason why one should receive a construction different from that given to the other. What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would other-

wise be his heirs. Thus, innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture.

There have been some Acts of Parliament, providing for limited forfeitures, closely resembling those described in the Act of Congress as modified by the joint resolution. The statute of 5th Elizabeth, c. 11, "against the clipping, washing, rounding, and filing of coins," declared those offenses to be treason, and enacted that the offender or offenders should suffer death, and lose and forfeit all his or their goods and chattels, and also "lose and forfeit all his and their lands and tenements during his or their natural life or lives only." The statute of 18th Elizabeth, c. 1, enacted the same provision "against diminishing and impairing of the queen's majesty's coin and other coins current within the realm," and declared that the offender or offenders should "lose and forfeit to the queen's highness, her heirs and successors, all their lands, tenements, and hereditaments during his or their natural life or lives only." Each of these statutes provided that no attainder under it should work corruption of blood, or deprive the wife of an offender of her dower. The statute of 7 Anne, c. 21, is similar. They all provide for a limited forfeiture—limited in duration, not in quantity. Certainly no case has been found, none, we think, has ever existed, in which it has been held that either statute intended to leave in the offender an ulterior estate in fee after a forfeited life-estate, or any interest whatever subject to his disposing power. Indeed, forfeiture has frequently been spoken of in the English Courts as equivalent to conveyance. It was in Lord Lovel's Case, Plowd. 488, where it was said by HARPER,

Justice, "The Act (of attainder) is no more than an instrument of conveyance, when by it the possessions of one man are transferred over to another." And again: "The Act conveys it (the land forfeited) to the king, removes the estate out of Lovel, and vests it entirely in the king." In Burgess *v.* Wheate, 1 Eden, 201, in discussing the subject of forfeiture, the Master of the Rolls said, "The forfeiture operated like a grant to the king. The crown takes an estate by forfeiture, subject to the engagements and incumbrances of the person forfeiting. The crown holds in this case as a royal trustee (for a forfeiture itself is sometimes called a royal escheat). . . . If a forfeiture is regranted by the king, the grantee is a tenant *in capite*, and all mesne tenure is extinct." See, also, Brown *v.* Waite, 2 Mod. 133. If a forfeiture is equivalent to a grant or conveyance to the government, how can anything remain in the person whose estate has been forfeited which he can convey to another? No conceivable reason exists why the construction applied to the English statutes referred to should not be applied to our Act of 1862 and the joint resolution. If, in the British statutes, the sole object of the limitation of the duration of forfeiture was a benefit to the heirs of the offender, it is the same in our statutes; and it is a perversion of the intent and meaning of the joint resolution to read it as preserving rights and interests in those who under the Act had forfeited all their estate. What was seized, condemned as forfeited, and sold, in the proceedings against Charles S. Wallach's estate, was not, therefore, technically a life-estate. It is true, that in Bigelow *v.* Forrest, 9 Wall. 339, and Day *v.* Micou, 18 Ib. 156, some expressions were used indicating an opinion that what was sold under the confiscation Acts was a life-estate carved out of a fee. The language was, perhaps, incautiously used. We certainly did not intend to hold that there was anything left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide anything respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.

It is argued on behalf of the defendant, that because under a confiscation sale of land, or of estate therein, the purchaser takes an interest terminable with the life of the person whose property has been confiscated, the fee must be somewhere; for it is said that a fee can never be in abeyance; and as the fee cannot be in the United States, they having sold all that was seized, nor in the purchaser, whose interest ceases with the life, it must remain in the person whose estate has been seized. The argument is more plausible than sound. It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; and it is, therefore, of no weight in the inquiry what was intended by the Confiscation Act and concurrent resolution. Undoubtedly there are some anomalies growing out of the congressional legislation, as there were growing out of the statutes of 5th and 18th Elizabeth; but it is the duty of the Court to carry into effect what Congres intended, though it must be by denying the applicability of some common-law maxims, the reasons of which have long since disappeared. It has not been found necessary in England to hold that a reversion remained in a traitor after his attaint, though the statutes declared that the forfeiture shall be during his natural life only.

We are not, therefore, called upon to determine where the fee dwells during the continuance of the interest of a purchaser at a confiscation sale, whether in the United States or in the purchaser, subject to be defeated by the death of the offender whose estate has been confiscated. That it cannot dwell in the offender, we have seen, is evident; for, if it does, the plain purpose of the Confiscation Act is defeated, and the estate confiscated is subject alike in the hands of the United States and of the purchaser to a paramount right remaining in the offender. If he is a tenant of the reversion, or of a remainder, he may control the use of the particular estate; at least, so far as to prevent waste. That Congress intended such a possibility is incredible.

If it be contended that the heirs of Charles S. Wallach cannot take by descent unless their father, at his death, was seised of an estate of inheritance—*e. g.*, reversion or a remainder—it may be answered, that, even at common law, it was not always necessary that the ancestor should be seised to enable the heir to take by descent. Shelley's Case is, that, where the ancestor *might* have taken and been seised, the heir shall inherit: FORTESCUE, J., in Thornby *v.* Fleetwood, 1 Str. 318.

If it were true that, at common law, the heirs could not take in any case where their ancestor was not seised at his death, the present case must be determined by the statute. Charles S. Wallach was seised of the entire fee of the land before its confiscation, and the Act of Congress interposed to take from him that seisin for a limited time. That it was competent to do, attaching the limitation for the benefit of the heirs. It wrought no corruption of blood. In Lord de la Warre's Case, 11 Coke, 1 a, it was resolved by the Justices "that there was a difference betwixt disability personal and temporary and a disability absolute and perpetual; as, where one is attainted of treason or felony, that is an absolute and perpetual disability, by corruption of blood, for any of his posterity to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him; but, when one is disabled by Parliament (without any attainder) to claim the dignity for his life, it is a personal disability for his life only, and his heir after his death may claim as heir to him, or to any ancestor above him." There is a close analogy between that case and the present. See, also, Wheatley *v.* Thomas, Lev. 74.

Without pursuing this discussion farther, we repeat, that to hold that any estate or interest remained in Charles S. Wallach after the confiscation and sale of the land in controversy would defeat the avowed purpose of the Confiscation Act, and the only justification for its enactment; and to hold that the joint resolution was not intended for the benefit of his heirs exclusively, to enable them to take the inheritance after his death, would give preference to the guilty over the innocent. We

cannot so hold. In our judgment, such a holding would be an entire perversion of the meaning of Congress.

It has been argued that the proclamations of amnesty after the close of the war restored to Charles S. Wallach his rights of property. The argument requires but a word in answer. Conceding that amnesty did restore what the United States held when the proclamation was issued, it could not restore what the United States had ceased to hold. It could not give back the property which had been sold, or any interest in it, either in possession or expectancy: Semmes *v.* United States, 91 U. S. 21. Besides, the proclamation of amnesty was not made until December 25, 1868.

Decree reversed.

WILLIAMS, R. P. 126; 2 Bl. Comm. 267; Brown *v.* White, 2 Mod. 133; Bigelow *v.* Forrest, 9 Wall. 339; Day *v.* Micou, 18 Wall. 156; Minn. Gen. Laws, 1889, ch. 129, § 4; Const. Minn., Art. I, § 11; Const. U. S., Art. III, § 3.

Forfeiture, as at common law, inflicted as punishment for crime, is unknown in any of the States of the Union: WILLIAMS, R. P. 126, note.

i

Title by Marriage.

Title by marriage is that which a husband and wife respectively acquire in the lands of each other under the law by virtue of their marriage.

RANDALL *v.* KREIGER.

Supreme Court of the United States, 1874.

23 Wall. 137.

Mr. Justice SWAYNE. There is no controversy between the parties as to the facts.

When the power of attorney was given there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it.

The validity of the deed as respects Randall, the husband, is not questioned, but its efficacy as to the widow, the appellant in this case, is denied. Her claim to dower is restricted upon

several grounds, and among them that the defect in the deed was remedied by the curative Act of 1857.

We have found it necessary to consider only the point just stated.

It is not objected that the Act of 1857, as regards its application to the present case, is in conflict with the Constitution of the State. We have carefully examined that instrument and have found nothing bearing upon the subject.

Nor was the Act forbidden by the Constitution of the United States.

There is nothing in that instrument which prohibits the Legislature of a State or Territory from exercising judicial functions, nor from passing an Act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired, but confirmed by curative statutes.

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfill by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society.

By the common law, where there was no antenuptial contract, certain incidents belonged to the relation.

Among them were the estate of tenant by the curtesy on the part of the husband if issue were born alive and he survived the wife, and on her part dower if she survived the husband. Dower by the common law was of three kinds: *Ad ostium ecclesiæ, Ex assensu patris,* and that which in the absence of the others the law prescribed. The two former were founded in contract. The latter was the creature of the law. Dower *Ad ostium ecclesiæ* and *Ex assensu patris* were abolished in England by a statute of the 3d and 4th William IV, ch. 105. The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country.

During the life of the husband the right is a mere expectancy or possibility. In that condition of things the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be molded according to the will of the Legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property.

The power of a Legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled.

In Watson *v.* Mercer the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the

30th of May, 1785. It was fatally defective as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert.* She died without issue. James Mercer died, leaving children by a former marriage. After the death of both parties her heirs sued his heirs in ejectment for the premises and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the Legislature passed an Act which cured the defective acknowledgment of Mary Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and the judgment of affirmance was affirmed by this Court. This case is conclusive of the one before us.

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the Courts the vested right is usually unattended with the slightest equity.

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative Act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

The purchase-money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The Act accomplished what a Court of Equity, if called

upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The Legislature thus did what right and justice demanded, and the Act strongly commends itself to the conscience and approbation of the judicial mind.

Decree affirmed.

Title by curtesy.

Title of the husband by curtesy vests upon the death of the wife without any preliminary formality.

WITHAM *v.* PERKINS.

Supreme Judicial Court of Maine, 1824.

2 Greenl. 400.

One E. Perkins died in 1775, leaving six children inheriting his estate in common, of whom the tenant was one and Lydia P. another. Lydia married David Thompson, to whom was born one child, this demandant. Eight days after the birth of this child the mother died, and David Thompson never went into possession of his wife's lands left by her father to her in common with the other children. The demandant, some forty years after her mother's death, but while her father was living, made an entry and claimed as reversioner her mother's share.

MELLEN, C. J. The demandant is the granddaughter of Eliphalet Perkins, and the tenant is his son, and has been in the open and actual possession of the lands and estate of which the demanded premises are a part, for more more than forty years before the commencement of this action. A short time before it was commenced the demandant made a *formal entry*, and then claimed her share of the estate—in this action she declares on her own seisin—and the questions are—whether she had a *right of entry* and a *right of* action when this suit was commenced—and whether she can have any such right during the life of David Thompson, her father. The jury have decided that the long-continued and actual possession of

the tenant has been as *tenant in common* with the other heirs of Eliphalet Perkins, and so not an adverse possession, and a disseisin of those heirs. It follows that when Mrs. Thompson died in 1784, she died seised, as tenant in common with the other heirs of her father, the tenant's possession being constructively the possession of all his co-tenants. David Thompson, on the death of his wife, became seised, *as tenant by the curtesy*, of the share in common, of which his wife died seised, and for the same reason that the actual possession of the tenant has not been adverse to the right and title of the *heirs* it has not been adverse to the right and title of Thompson as tenant by the curtesy—and hence also it follows that ever since the death of his wife he has been *constructively* in possession as tenant in common with Perkins, the tenant. This estate of Thompson still continues and his rights have not been impaired by any act on his part, though the tenant has been permitted to occupy and receive the profits of the estate. From this view of the facts of the case and the application of well-known principles to those facts, it plainly results that during the life of David Thompson the tenant by the curtesy, the heirs of his wife can have no right of entry upon the lands, whether in the actual or constructive possession of Thompson himself, or of any other person. The entry, then, of the demandant, made upon the lands previous to the commencement of this action, was *without right*, and proves no lawful seisin sufficient to maintain this action—and being merely a *formal entry*, she thereby gained no title by wrong, in virtue of which she might maintain a writ of entry against the person on whose possession such formal entry was made. It is competent for the tenant to make this defense, and we are of opinion it is sufficient to bar the plaintiff. Let the verdict be set aside and a non-suit be entered.

1 Washburn, R. P., p. 191, § 56; Watson *v.* Watson, 13 Conn. 83.

After birth of child the husband's right is initiate: Foster *v.* Marshall, 2 Foster (N. H.), 491.

It becomes consummate on the wife's death: Oldham *v.* Henderson, 5 Dana, 254.

Curtesy in equitable estate: Ogden *v.* Ogden, 28 S. W. 796.

Title in dower.

Though consummate upon the husband's death, the widow cannot enter, nor is her legal title to the freehold perfect so that she can transfer the same, until her dower has been duly assigned.

MOORE *v.* HARRIS.

Supreme Court of Missouri, 1887.

91 Mo. 616; 4 S. W. Rep. 439.

SHERWOOD, J. Ejectment for lot 63 in the town of Benton. Both parties claim under Elizabeth Crow, as the common source of title. To show title in himself, the plaintiff, after showing title in Albion Crow, the husband of Elizabeth Crow, by a commissioner's deed, dated October 28, 1845, next offered in evidence a deed from the collector of Scott County, Thomas S. Rhoades, to Elizabeth Crow, dated October 28, 1867, professing to convey to the grantee therein the lot in controversy, as the property of Albion Crow, and as sold because of delinquent taxes.

Plaintiff next offered in evidence a deed for the lot in question, from Elizabeth Crow to himself, dated March 25, 1868, which deed, so far as necessary to copy it here, is as follows: "Know all men by these presents, that I, Elizabeth Crow, of the county of Scott and State of Missouri, have this day, for and in consideration of the sum of seven hundred dollars, to me in hand paid by Joseph H. Moore, of the same county and State, *granted, bargained, and sold,* and by these presents do *grant, bargain, and sell,* unto the said Joseph H. Moore the following described real estate, situate in the county of Scott and State of Missouri; that is to say, the southeast quarter of the northeast quarter of section 14, and the undivided half interest in the west half of the southwest quarter of section 12, in township 28 north, range 13 east, it being forty and undivided half of eighty acres. Also, all the right, title, and interest, which I have of, in, and to lots 91 and 121, in the town of Commerce, in said county of Scott; and also lot *63,* in the town of Benton, in said county of Scott."

The next link in the chain of plaintiff's title was a deed to Elizabeth Crow, acknowledged October 29, 1870, executed by plaintiff as administrator of Albion Crow, and conveying the lot in question.

The claim of the defendant Harris is based on a warranty deed for the lot aforesaid, executed November 30, 1877, by Elizabeth Crow to Mary J. Harris, wife of said defendant, Harris.

1. The deed of the collector of Scott County for the lot in dispute, executed to Elizabeth Crow in 1867, was worthless, and conveyed no title, and was void on its face, in consequence of its failing affirmatively to show that all the prerequisites which the law had prescribed, as to the fact of notice having been given of the delinquency of the land for taxes, had been complied with prior to judgment rendered by the County Court; and in consequence of its failing affirmatively to show that advertisement had been made of the intended sale of the land for taxes in the precise method required by the statute. The statements made by the collector in his deed, that these things —these jurisdictional facts—had been done "*according to law*," or "*in manner and form as directed by law*," go for nothing in the estimation of the Courts. The *facts done* must, in such cases, be set forth, in order that the *Courts* may determine whether the respective officers and Courts have acted "according to law:" Lagroue *v.* Rains, 48 Mo. 536; Spurlock *v.* Allen, 49 Mo. 178; Large *v.* Fisher, Ib. 307.

The bill of exceptions shows that this deed was admitted in evidence despite the objections of the defendants. The judgment for plaintiff, however, recites that it was finally excluded from the consideration of the jury by order of the Court. This recital, if true, should have been preserved by the bill of exceptions, the office of which is to preserve all matters of mere exception. I judge, however, from the first instructions asked by, and refused, the defendants, that the Court did not regard the collector's deed as void on its face. It was thus void, as already seen from the authorities cited, and no title passed to Elizabeth Crow by reason thereof.

2. I now come to consider the effect of the deed to plaintiff of date March 25, 1868, whose recitals have already been in substance set forth; for on this deed plaintiff's paper title exclusively depends. I think it quite too plain for argument that the statutory covenants of "grant, bargain, and sell," do not extend to nor include the lot in question. If this be true, then the deed just mentioned, so far as concerns lot 63, is in effect a bare quit-claim deed, and no after-acquired title of Elizabeth Crow could inure to the benefit of plaintiff. Besides, it already appears that at the time the deed of March 25, 1868, was made, the only title Elizabeth Crow had in the premises was that of a dowress, whose dower remains unassigned. The authorities agree that in such case that the legal title of a dowress does not pass by her deed. The only right or interest thereby passing is one which may be enforced and effectuated in equity: 1 Washb. Real Prop. (4th ed.) 303; 2 Scrib. Dower, 40, 43. Of course, these remarks are not intended to apply to the case of a dowress who releases her dower right to the terretenant, or one in possession of the lands, or to whom she stands in privity of estate: Washb. *supra;* Scrib. Dower, 40.

The only right or interest, therefore, which plaintiff acquired by reason of his deed, as aforesaid, was one vesting in action only, so far as the views of a Court of Law are concerned. What a Court of Equity would do in the premises does not matter, as in this action the plaintiff must recover on the legal title, and not on uneffectuated equities.

3. Nor did the plaintiff gain any title to the premises by reason of the operation of the statute of limitations, since his possession was not adverse and continuous for the requisite statutory period: Wilson *v.* Albert, 89 Mo. 537, 1 S. W. Rep. 209.

As this cause was not tried in conformity to the views here announced, the judgment is reversed, and the cause remanded.

2 Scribner on Dower, 27–35; 1 Washburn, R. P., p. 283, § 3.

Dower is a freehold estate growing out of marriage, seisin, and the death of the husband: Yale *et ux. v.* Jay *et al.*, 31 Ark. 576.

After marriage and seisin by the husband, the wife's interest in the land is inchoate subject to legislative control; but at the death of the husband

the widow's prior interest becomes a vested right, not subject to legislative modification: Guerin *v.* Moore, 25 Minn. 462.

While inchoate it may be wholly abolished: Morrison *v.* Rice, 35 Minn. 436.

While inchoate it is such an interest in the land that it cannot be the subject of contract between husband and wife: *In re* Rausch, 35 Minn. 291.

Until assignment of dower the widow has not title subject to alienation: Heisen *v.* Heisen, 145 Ill. 658; 34 N. E. 597.

Statutory Modification.

Curtesy and dower have been abolished in some States, and enlarged or otherwise modified in others, so that husband and wife take respectively a one-third or other proportional part of each other's lands in fee simple.

ROCKHILL *v.* NELSON.

Supreme Court of Indiana, 1865.

24 Ind. 422.

GREGORY, J. The plaintiff in this case is the widow, having been the third wife, of William Rockhill, who died seised in fee simple of the land in dispute. He had by the plaintiff one child, which died, in infancy, a short time before his death. The defendants are the children of the deceased husband by a former wife. The widow claims one-third of the land of which her husband died seised, in fee. The defendants insist that she is entitled to a life estate only.

The rights of the parties depend upon the construction to be given to our law of descent.

By the 17th section of that law the surviving widow takes one-third, in fee, of all the lands of which the husband died seised. By the 27th section she takes, as the heir of her husband, one-third, in fee, of all the land owned by the husband *at any time during coverture,* in the conveyance of which she has not joined, and one-third, absolutely, of all equitable estates owned by him at his death. Under these sections the plaintiff would take one-third of the real estate of her deceased husband in fee. The only inquiry will be how and to what

extent does the proviso to § 24 (1 G. & H. 296) affect or modify §§ 17 and 27, the former preceding and the latter following § 24? The proviso is in these words: "*Provided*, that if a man marry a second or other subsequent wife, and has by her no children, but has children *alive* by a previous wife, the land which, at his death, *descends* to such wife, shall, at her death, *descend* to his children."

In an able and well-considered brief, the learned counsel of the appellant argue thus: "The language of this proviso is, in some respects, unmistakably clear. Something descends to the wife. What is it? If anything, it is one-third of her husband's real estate, not a life interest in his real estate. The proviso does not intimate such a thing. If the one-third does not descend to the widow, to whom does it descend? Not to the children or heirs, for by the clear and express words of the proviso they take whatever they may be entitled to, not at the death of the husband and father, but at the death of the widow. They take, not from the father, but from his widow. They take from her, at her death, nothing but what she, as heir of her deceased husband, took at his death. If she takes less than a fee, the children take nothing at all. Prior to the widow's death they can have no interest in the land which descends to her at her husband's death.

"If it shall be said that the widow takes but a life estate, then this clause, which by a strained and unnatural construction is made to reduce the widow's interest from a fee to a life estate, becomes absurd and nonsensical. For it is too clear to admit of doubt, unless words have lost all significance, that it was the purpose of this proviso to cast upon the husband's children, at the death of the widow, whatever she might then possess as the heir of the husband. To give effect to the plain and obvious meaning of this proviso it must be held, we think, that the *whole* interest in one-third of the deceased husband's lands descends, at his death, to his widow. That no part of this interest *then* descends to his children, for the simple reason that it is to descend to them, if at all, at the death of the widow. That it simply prescribes a rule of de-

scent, making the husband's children, in the particular case, the special, substituted heirs of the second or subsequent wife."

This position, so forcibly put, addressed to this Court before the decision in the case of Martindale *v.* Martindale, 10 Ind. 566, would have been entitled to grave consideration; and it is, indeed, difficult to see how it could have been met by legal argument. But there are some questions in law, the final settlement of which is vastly more important than how they are settled; and among these are rules of property, long recognized and acted upon, and under which rights have vested. It must be admitted that our law of descents, among the most important on our statute book, is not remarkable for precision and clearness, and that vexatious questions are often occurring, requiring judicial interpretation of this statute. We cannot change a decision without producing confusion in titles, as the ruling would necessarily relate back to the time the law came in force. But if the canon of descent, as settled by the determination of the Court of last resort is unjust, or even distasteful, the Legislature can change the rule by a new statute, without interfering with vested rights. As now constituted, however much we may differ from the opinions of our predecessors, we shall not introduce doubt and confusion in *questions of property* by overruling the previous decisions of this Court. We have had occasion, in the last few months, to overrule a number of cases, but only in that class in which the rulings operate upon the future and not upon the past, and which, in our opinion, will be attended by unmixed good.

The cases of Martindale *v.* Martindale, *supra*, and Ogle *et al.* *v.* Stoops *et al.*, 12 Ind. 380, were decided some six or seven years ago, and the rule therein established has been acquiesced in by the Legislature through three general and one special sessions, and ought not now, in our opinion, to be disturbed by this Court.

The judgment is affirmed, with costs.

In Indiana the surviving spouse takes as an *heir*, hence no assignment of the interest is necessary: Gaylord *v.* Dodge, 31 Ind. 41; Fletcher *v.* Holmes, 32 Ind. 510.

Iowa—abolished: Mock *v.* Watson, 41 Iowa, 241.

Illinois—Husband has *dower*, and until assignment his interest is not subject to alienation: Heisen *v.* Heisen, 34 N. E. Rep. 597; 145 Ill. 658.

In some States dower and curtesy have been enlarged to a one-third interest in fee simple, retaining their other essential features.

HOLMES *v.* HOLMES.

Supreme Court of Minnesota, 1893.

54 Minn. 352.

VANDERBURGH, J. The plaintiff's cause of action is for a divorce on the ground of the adultery of the defendant. In her complaint she demands that she be adjudged to have her dower in defendant's lands as if he were dead, and under this relief she claims to be entitled to hold the homestead of defendant for life, and an equal undivided third of all other lands of which he was during coverture seised, and to be allowed alimony. The Court adjudged the plaintiff entitled to a divorce on the ground stated, and awarded alimony, but refused dower, or the provision in lieu of dower, provided for by the present statute.

There is no doubt that 1878 G. S., ch. 62, § 24, secures to the wife, in the cases specified, an unqualified right to dower in the lands of her husband as if he were dead. By the statute in force when this section was enacted, the widow's right of dower, substantially as at common law, was preserved to her: 1851 R. S., ch. 49, § 1. By Laws 1875, ch. 40, estates in dower *eo nomine*, as then existing, were abolished, and, in lieu thereof, provision was made for a life estate in the homestead of the husband and an undivided one-third of all other lands of which he might die seised. By Laws 1876, ch. 37, and again in the Probate Code, enacted in 1889, the subject is revised, and, with some changes, the provisions of the Act of 1875 are retained, and incorporated under the head of "Title to Real Property by Descent." Now, under § 24, in question, is the rule to be applied as the term "dower" was

used and understood when that section was enacted, or is it to be given an enlarged and extended application, so as to embrace the present liberal provisions for the wife made out of his estate on the death of her husband? Estates in dower have been changed and enlarged in many of the States by legislative enactment (Noel *v.* Ewing, 9 Ind. 46; Smith's Appeal, 23 Pa. St. 9; Beard *v.* Knox, 5 Cal. 252); so that it has come to be understood generally as the provision in the nature of dower which the law makes for the wife from the estate of her deceased husband, and it is contingent only upon the seisin of the husband and his death, and beyond his power to divest. The present provisions for the wife, above specified, were clearly intended to be in lieu of dower, and retain its essential features. The interest thereby created is inchoate upon the marriage and seisin, and becomes absolute at his death, and is thus distinguishable from other provisions made for her as heir in certain contingencies. Her estate extends to the homestead and one-third of other lands of which her husband is seised during coverture, and cannot be divested without her consent. Unless it be held that any material change in the law of dower as it stood when 1878 G. S., ch. 62, § 24, was enacted would operate as a repeal of that section, or make it inoperative, we are of the opinion that the term "dower" therein must be interpreted to extend to the present statutory provisions referred to. The estate under consideration, thus created for the benefit of the wife, has always since the Act of 1875 been treated by this Court as in the nature of dower, and governed by the same rules of legal construction: *In re* Gotzian, 34 Minn. 159 (24 N. W. Rep. 920); *In re* Rausch, 35 Minn. 293 (28 N. W. Rep. 920); McGowan *v.* Baldwin, 46 Minn. 479 (49 N. W. Rep. 251); Dayton *v.* Corser, 51 Minn. 406 (53 N. W. Rep. 717). When, therefore, a divorce is ordered for the cause of adultery committed by the husband, the wife will be entitled to dower, as provided by the present statutes on the subject, as if he were dead. The decree of divorce will establish her right to the estate, but we do not think the statute contemplates that it should be set

off or assigned to her in the divorce proceedings. Nor would such decree be the basis of a writ of assistance to put her in possession (2 Bish. Mar. & Div., ed. 1801, §§ 1522, 1639); but, if possession is denied her, she can recover it, and will be entitled to partition as in other cases. As she was not entitled to such relief in this action, the judgment must be affirmed.

An undivided one-third of his lands "descends to" and becomes "vested in" the widow on the death of the husband: *In re* Gotzian, 34 Minn. 159.

It would seem that the widow's title becomes perfect and alienable on the death of the husband, without a formal assignment, although a partition may be necessary: Holmes *v.* Holmes, *supra.* See, also, *In re* Rausch, 35 Minn. 291; McGowan *v.* Baldwin, 46 Minn. 479; Dayton *v.* Corser, 51 Minn. 406.

j

Execution.

Title may be transferred by sale on execution, but it does not pass to the purchaser, in some States, until the time to redeem expires.

LINDLEY *v.* CROMBIE.

Supreme Court of Minnesota, 1883.

31 Minn. 232.

GILFILLAN, C. J. Taylor, in 1876, caused real estate to be sold on execution in his favor, and became the purchaser. Before the time for redemption expired, he executed a deed to Baldwin, whereby he did "grant, bargain, sell, release, and quit-claim" to him "all right, title, interest, claim, or demand in or to" the real estate. There was no redemption, and the question is, in whom, in Taylor or in Baldwin, did the title vest at the end of the time for redemption? The statute provides (Gen. St. 1878, c. 66, § 322), that, at the end of the time for redemption, the certificate of sale shall operate as a conveyance "to the purchaser or his *assigns*" of all the right, title, and interest of the person whose property is sold, in and to the same, at the date of the lien upon which the same was sold. From this it is apparent—*First,* that the title of the

debtor does not pass until the time to redeem expires; *second*, that, notwithstanding such title does not pass at once on the sale, yet the purchaser acquires by the incomplete sale a right which, by whatever name it may be called, is assignable; and *third*, that if such right is assigned, the title, when it passes by lapse of time and non-redemption, vests, by virtue of the statute, in the *assign* of such right.

The decisions of this Court are to the effect that the title of the mortgagor or judgment debtor does not pass to the purchaser till the time to redeem expires: Daniels *v.* Smith, 4 Minn. 117 (172); Donnelly *v.* Simonton, 7 Minn. 110 (167); Horton *v.* Maffitt, 14 Minn. 216 (289); Loy *v.* Home Ins. Co., 24 Minn. 315. In some of these cases, the language in the opinions used to express this goes further, and indicates that till then the purchaser acquires no rights or interests that he can convey. This language may have had, and probably has had, the effect to mislead as to what was really decided. But none of them holds that he does not acquire a right which he can assign.

If, in this case, the description in the deed is sufficient to include such a right, it passed by the deed to Baldwin, and the title of the debtor passed to him when the time to redeem expired. Is it a right, interest, claim, or demand in or to the land sold? It certainly is not a claim against any person, nor right or interest to or in anything other than the land. The statute (Gen. St. 1878, c. 66, § 327), treats it as some sort of interest in land. "The interest acquired upon any sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in the case of real property, and may be attached or sold upon execution in the same manner." The vendee in a recorded contract to convey real estate has, in law, no title or estate in the land; he has only a right that the title shall be vested in him according to the terms of the contract. Could any one claim that the deed of such vendee, in the terms of this deed, would not show an intent to pass the vendee's right under the contract, especially if it were the only right he had with respect to the

land? We think not. Nor do we see how it can be claimed that Taylor's deed does not show an intent to pass a somewhat similar right, a right to have the title vest in him by lapse of time, if not prevented by redemption.

Judgment reversed, and let the Court below enter judgment for the defendant.

Title passes on execution at the end of the time for redemption: Parke *v.* Hush, 29 Minn. 434. Formerly it passed on the day of sale: Dickinson *v.* Kinney, 5 Minn. 409.

k

Title by Judicial Decree.

Title to land may be transferred from one person to another by judicial action; as, in foreclosure proceedings, bankruptcy, or by probate proceedings, as in case of executors, administrators, and guardians.

Mortgage Foreclosure.

The Court may, at the request of the purchaser at the foreclosure sale, or of his assigns, vest the title by final decree in any person the applicant may name.

Dodge *v.* Allis.

Supreme Court of Minnesota, 1880.

27 Minn. 376.

Gilfillan, C. J. Appeal from what the statute (Gen. St. 1866, c. 81, § 33; Gen. St. 1878, c. 81, § 36,) designates a final decree in an action to foreclose a mortgage. The objection is made by motion to dismiss, that an appeal will not lie from such a decree; or, if one will lie, it must be taken as from an order—within thirty days. Whether it is to be deemed a judgment or order, inasmuch as legal rights are or may be determined by it, there is undoubtedly a right of appeal; and, although it is not designated as a judgment but as a decree, as it has in its effect upon the matters determined by it, and in the mode of its entry, all the essentials of a judg-

ment, it should be appealed from as such. The motion to dismiss is denied.

An important question in the case is, can this Court, upon an appeal from the so-called "final decree," consider alleged errors in the judgment directing the sale, or must an appeal from that judgment be brought to secure a review of it? This must depend on the question which is to be deemed the final judgment determining the action, and settling the rights of the parties to it. The question is not difficult to answer. The judgment directing the sale (Gen. Stat. 1866, c. 81, § 26; Gen. St. 1878, c. 81, § 29,) adjudges the amount due, with costs and disbursements, and the sale of the mortgaged premises or some part thereof to satisfy said amount, and directs the sheriff to proceed and sell the same, etc. This judgment determines all the issues in the action, and provides just the relief to which the plaintiff is entitled. When it is entered, all controversy as to the respective rights between the plaintiff and the several defendants with respect to the mortgage and the right to enforce it is determined. All that follows it—the sale, report of sale, confirmation, etc.—are merely to carry into effect and enforce the determination of the rights of the parties which the judgment makes. The "final decree" does not determine any issue, nor any of the merits between the parties, nor adjudicate any of the rights between them as parties, nor contain any provision which affects the relief to which the plaintiff is entitled. Before it can be entered, plaintiff must have got all the relief he is entitled to in the action. The property has been sold, and the proceeds are presumed to have been applied as directed by the judgment. It is not a judgment upon the matters involved in the action. The application for the decree and the entering of it, though done in the action, is not a proceeding between the plaintiff and the defendants or any of them, or between any of the parties to the action, as parties. It is a proceeding on behalf of the purchaser, whoever he may be, as purchaser. The decree is for his benefit, and not for the benefit of any party to the action. Any controversy which may arise on the appli-

cation must be between him and one or more of the parties. No controversy between the parties to the action, in their character of such parties, can then be determined. The provision for such a "final decree" may at first sight seem singular, yet it is undoubtedly a wise provision. It is intended to determine in the original action, as between the purchaser and all the parties to the judgment for the sale, that there has been no redemption, and to afford to the purchaser record evidence in the way of a decree or judgment, conclusive as to all the parties, that the title is in the purchaser free from any right to redeem. On an appeal from the "final decree" no error can be alleged against the judgment for a sale. To review that judgment an appeal must be taken from it.

The judgment for the sale was entered November 6, 1876, the sale under it made December 23, 1876, and the report of sale was confirmed January 6, 1877. As appears by the report, the plaintiffs in the action were the purchasers. Application by the plaintiffs for the final decree was noticed for October 28, 1879, long after all rights of redemption were barred by lapse of time. The decree was entered the same day. The decree is, of course, taken to be correct; a party seeking to reverse it must show that it is erroneous, and that the error prejudices him.

The defendant Allis, appellant here, alleges it to be erroneous, in that it adjudges the title to be in defendant Davidson, who was not the purchaser; and it does not appear that he was the assignee of the purchaser. The decree was entered on the motion of the plaintiffs, who were the purchasers. So far as appears, they were the only persons who then had any interest in the title which passed by the sale. If they consented that the title should, nevertheless, be vested by the decree in any other person, it was a matter between them and such person. It is not apparent how any other party to the action, whose right of redemption was then barred, could be prejudiced by it. Appellant claims that, to justify the decree in vesting the title in Davidson there must have been an assignment to him from the purchaser, and that such assign-

ment to him, he being the debtor and mortgagor, would have operated as in favor of appellant, his grantee of an undivided half of the property subsequent to the mortgage, as a redemption from the sale; and in that case a decree vesting the entire title in Davidson as against him could not be entered, and the entering it was therefore error prejudicial to him. This argument rests, not on a state of facts shown by the record, but one which has only assumption and conjecture to sustain it. First, it does not appear that, prior to the actual entry of the decree, there was anything between plaintiffs and Davidson in the nature of an assignment. Further, if that had appeared, there was nothing to show it was made at such a time that it would take effect as a redemption, nor is there anything to show that Davidson owed Allis any duty to redeem. In the pleadings between plaintiffs and Allis in the action to foreclose, a conveyance of an undivided half of the property by Davidson to him, subsequent to the mortgage, is alleged by Allis in his answer, and admitted by plaintiffs in their motion for judgment. But that did not conclude Davidson, nor would the answer of Allis and the admission of plaintiffs be evidence of the fact as against him. In that action no issue of the kind was tendered to him, and no situation of the action prior to the judgment for sale occurs to us in which it could be, so that it could be litigated and determined between them.

It is also objected that the notice of application for the decree was given by plaintiffs, and that under that notice only a decree vesting the title in them, and not one vesting it in some one else, could be entered. The purchaser or his assigns should make the application, and, of course, he must give the notice. A notice by one not holding, at the time of serving it, that position, would not do. Whether, upon his assigning after the notice, the proceeding would have to drop and be renewed by the assignee, or the application could still be made by the party serving the notice, for the benefit of his assignee we did not find it necessary to determine. But we see no reason why, the notice and application being served and made

by the right person, he may not on the hearing request a decree vesting the title in any one he may name, and the decree be so entered—certainly, so far as the other parties in the action, in their character as such parties, are concerned.

Decree affirmed.

Minn. Gen. Stats. 1878, ch. 81, § 36.

The District Court has power to pass title to real estate by judgment, without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgments into effect; and such judgment being recorded in the office of the register of deeds of the county where such real estate is situated, shall, while in force, be as effectual to transfer the same as a deed of the defendant: Gen. Stats. Minn. 1878, p. 818, § 32.

1

Bankruptcy.

The rule *caveat emptor* applies at judicial sales, both as to the title and the condition of the property.

Barron *v.* Mullin.

Supreme Court of Minnesota, 1875.

21 Minn. 374.

Gilfillan, C. J. Henry Chaffee, Charles L. Snyder, and this defendant were copartners, and in their copartnership business owned and used real and personal property. Snyder died, and after his death Chaffee brought suit against this defendant and Margaret Snyder, the widow and administratrix, and Harriet Snyder, the sole heir of the deceased partner, to close up the partnership affairs. By the judgment in that suit this plaintiff was appointed receiver, and directed to sell all the real and personal property of the firm, and, pursuant to that direction, he offered for sale at auction, and sold, in one parcel, as the property of the firm, Lots 2, 3, 4, and 5, Block 75, in the town of Faribault, with the buildings, machinery, etc. This defendant purchased, at the price of $6,800, two-thirds to be paid down, and the other third to be paid in one year, with

interest at the rate of seven per cent. per annum, and to be secured by mortgage on the property. The receiver made his report of sale, specifying the above as the property sold, and the price and terms, and, on the stipulation of all the parties to the suit, the report was confirmed. The receiver tendered a deed, and demanded performance by defendant, which he refused. Upon these facts the complaint is based, and demands judgment for $6,800, with interest from April 1, 1873, the date of the tender of the deed. The Court below directed a verdict for the $6,800, with interest from that date at seven per cent. per annum, and the jury found accordingly.

On the trial the defendant asked leave to amend his answer and set up certain matters of defense not previously pleaded. The application was denied. It was addressed to the sound discretion of the Court, and we see no reason to think that the discretion was not properly exercised.

The defendant insisted, at the trial, that the receiver was not authorized by the judgment to sell Lot 2. He did not claim that it was not the property of the firm; the answer admits that it was. The judgment did not specifically describe the property to be sold, but directed a sale of all the real estate of the firm, which is sufficient authority to sell Lot 2, if, as is not denied, that lot belonged to the firm. And the fact that the complaint, in describing the property of the firm, does not mention Lot 2, does not control the judgment.

He also insisted that, in the parcel offered for sale and sold by the receiver, and bought by him for the $6,800, there was a piece other than the four lots described, and that such other piece was not included in the deed tendered by the receiver. This might have been a good defense, as a man is not obliged to receive any other than the precise property which he purchased, had it not been for the confirmation of the report of sale. The report specifies, as sold to defendant, only Lots 2, 3, 4, and 5. The defendant might have opposed, and, if he claimed that it was incorrect, he ought to have opposed the confirmation of the report. As he acquiesced in it, he is deemed to have adopted it, and is bound by the order of the Court con-

firming it: Smith *v.* Arnold, 5 Mason, 414, 420; and this is especially so after the report has been confirmed, pursuant to his written consent that it shall be.

The defendant objects to comply with the terms of his purchase on the further ground that the widow of Snyder has a vested right of dower in an undivided one-third of the property, and the wife of Chaffee an inchoate right of dower in an undivided third, and that the receiver did not procure any release of those rights. The rule *caveat emptor* applies to purchasers at judicial sales: Bashore *v.* Whisler, 3 Watts, 490; Fox *v.* Mensch, 3 Watts & Serg. 444; King *v.* Gunnison, 4 Pa. St. 171; England *v.* Clark, 4 Scam. 486. The purchaser at such sales knows that nothing can be sold, except the interest of the parties to the suit, and it is for him to ascertain, before purchasing, what that interest is.

This rule applies not only in respect to the title, but to the condition of the property. The defendant alleges in his answer, that, during the winter prior to the sale, the roof of the building had, by the action of frost, snow and ice thereon, become, and at the time of the sale and confirmation was, wholly ruined and destroyed, and that at the time of the sale he was ignorant of such condition, and that at such times, by reason of the snow and ice, it was impossible for him to ascertain such condition. No fraud or misrepresentations were alleged. Under the rule *caveat emptor* this is no defense, in whole or in part, to the suit for the price bid.

Two-thirds of the price bid was to be paid at once. The other third was, by the terms of the sale, to be paid in one year. The suit was brought before the year expired, and it it insisted that plaintiff cannot, in this suit, recover that third. Where property is sold, to be paid for at a future time, no suit can, as a general thing, be brought on the promise to pay, till the time stipulated; but where the purchaser agrees to give security for the deferred payment, and fails to do so, a suit may be maintained for breach of the agreement to give the security; and in such action the damages are the value of the security agreed upon—*prima facie*, the amount of the sum to be secured:

Rinehart *v.* Olwine, 5 Watts & Serg. 157; Hanna *v.* Mills, 21 Wend. 90.

In this case the plaintiff was entitled to recover two-thirds of the price bid, because it was payable at once, and a sum equal to the other third, because it is presumed that the security, if given as agreed upon, would have been worth that to plaintiff.

The order denying a new trial is affirmed.

m

Administrators and Executors.

CURRAN *v.* KUBY.

Supreme Court of Minnesota, 1887.

37 Minn. 330.

VANDERBURGH, J. There seems to be no basis for this appeal. The action is brought to set aside an administrator's sale and subsequent conveyances, and all proceedings in the Probate Court upon which the sale was founded. The proceedings are upon their face admitted to be regular, and in conformity with the statute. There is no question raised as to the regularity of the appointment of the administrator, or that he was in fact licensed to sell the property in controversy at private sale, in pursuance of the provisions of the General Statutes (as amended by Laws 1881, c. 43), by the Probate Court having jurisdiction; and it does not appear that the order of license to sell required that notice of sale should be given. The administrator also gave the bond and took the oath required by law, and it is not alleged or pretended that the premises were not sold as required by law, or that the present holders did not purchase them in good faith. But two points are made.

The first, in respect to the notice of sale, is already disposed of. No notice was required in the case of a private sale, unless expressly directed.

2. The plaintiff claims that the demurrer admits that there were in fact no debts against the estate, though proved before the Court, and that the petition of the administrator for license to sell the real estate was false in that respect, also that the order to show cause was never served upon the persons interested in the estate, and that the record reciting and showing such service is also false.

(*a*) These matters were, however, each adjudicated and determined by the Probate Court, on the return-day of the order, upon the allegations and proofs as shown by the record. As to these questions, the record imports verity: Davis *v.* Hudson, 29 Minn. 27 (11 N. W. Rep. 136).

(*b*) The Court had acquired jurisdiction of the estate, and the administration thereof, and still retained it. The sale could not, therefore, be attacked for irregularities, omissions, or errors, in the proceedings which culminated in the license: Rumrill *v.* First Nat. Bank, 28 Minn. 202 (9 N. W. Rep. 731). In the case cited the petition for license was defective in several particulars; for instance, it showed no debts of the intestate. But it was held that under the provisions of Gen. St. 1878, c. 57, § 51, the sale could not be avoided for such cause. The same rule is applicable to this case.

Order affirmed.

McGowan *v.* Baldwin, 46 Minn. 477; Streeter *v.* Wilkinson, 24 Minn. 288.

n

Guardian's Sale.

WEST DULUTH LAND CO. *v.* KURTZ.

Supreme Court of Minnesota, 1891.

45 Minn. 380.

MITCHELL, J. Action to determine adverse claim to real property situated in St. Louis County. The defendants claim title as heirs-at-law of one George Leidner, who died in 1860,

intestate, and seised of the property in controversy. The plaintiff claims title from the same source, under a sale by the guardian of the defendants (then minors) under a license from the Probate Court of St. Louis County. The guardian who made this sale was the mother of the defendants, who was appointed by the Probate Court of that county March 2, 1872, the defendants being residents of Wisconsin, where they lived with their mother. The defendants assail the validity both of the appointment of the guardian and of the sale itself. The ground of attack upon the appointment of guardian is that the Probate Court in Minnesota had no jurisdiction to appoint a general guardian for non-resident minors. That the Court had no jurisdiction to appoint a guardian of the persons of non-resident minors is unquestionably true, but it is equally true that the statute authorizes a Probate Court to appoint a guardian of any estate which a non-resident minor may have in this State, and the validity of such statutes is well settled. Jurisdiction to appoint a guardian exists as well when the infant has property in the State where the jurisdiction is sought to be exercised as when he is domiciled therein. It rests upon a like basis in both cases, viz., the right and duty of a government to take care of minors, as respects either person or property. The fact that the appointment in this case was too broad, to wit, over both person and estate, did not render it invalid in respect to the estate which the minors had within the jurisdiction of the Court: Davis *v.* Hudson, 29 Minn. 27 (11 N. W. Rep. 136). The contention of defendants, that a guardian of the estate of the minors within the State could only be appointed after a general guardianship in the State of the domicile, and as ancillary thereto, is wholly incorrect. The statute imposes no such condition, and it would be of doubtful constitutionality if it did.

2. This brings us to the grounds of attack against the sale itself. No defects or irregularities will invalidate the sale, unless they go to one or more of the five essentials specified in Gen. St. 1878, c. 57, § 51. The record in this case shows that the guardian was licensed to make this sale by the Probate

Court by which she was appointed and in the county in which the land was situated; consequently it was the Court "having jurisdiction." Also that the guardian gave a bond, which was approved by the Judge of Probate, and took the oath prescribed by statute. This oath having been found among the regular files of the Probate Court, the fact that the Judge had omitted or neglected to indorse upon it the fact and date of its filing was not material. There is no proof, and there is no presumption, that the oath was spurious or that it was surreptitiously placed in the files after the sale. It shows by its date that it was made before. We fail to discover any defects, or even irregularities, in the notice of the time and place of sale. All that the statute requires is that the notice be posted and published for three weeks next before the sale. The guardian's report of sale, which was verified, states in detail a compliance with every requirement both of statute and of the license to sell, and a sale according to the notice at public auction, and the sale was duly confirmed by the Court. These seem to cover the whole ground, so as to leave no available objection to the sale in this collateral action.

We have made no reference to the alleged insufficiency of the notice of the hearing of the application for license to sell, for, even if the sale could be avoided on any such ground, the objections to the notice seem to be based upon the misapprehension of counsel that the statute required it to be published six weeks instead of only four, as the fact is.

What we have said renders it unnecessary to consider the effect or applicability of the statute of limitations (Laws 1889, c. 46, § 204) invoked by plaintiff.

Judgment affirmed.

Dawson *v.* Holmes, 30 Minn. 107; Menage *v.* Jones, 40 Minn. 254; Richardson *v.* Folwell, 49 Minn. 210; Burrell *v.* Railway Co., 43 Minn. 363; White *v.* Iselin, 26 Minn. 487.

2

By Act of Parties.

Title acquired by act of parties is of two kinds: (1) By grant, public or private; (2) by devise.

a

Public Grant.

Title by public grant is that derived from the government, either national or state.

National.

MOORE *v.* ROBBINS.

Supreme Court of the United States, 1877.

96 U. S. 530.

Mr. Justice MILLER. This case is brought before us by a writ of error to the Supreme Court of the State of Illinois.

In its inception, it was a bill in the Circuit Court for De Witt County, to foreclose a mortgage given by Thomas I. Bunn to his brother Lewis Bunn, on the south half of the southeast quarter and the south half of the southwest quarter of section 27, township 19, range 3 east, in said county. In the progress of the case, the bill was amended so as to allege that C. H. Moore and David Davis set up some claim to the land; and they were made defendants, and answered.

Moore said that he was the rightful owner of forty acres of the land mentioned in the bill and mortgage, to wit, the southwest quarter of the southwest quarter of said section, and had the patent of the United States giving him the title to it.

Davis answered that he was the rightful owner of the southeast quarter of said southwest quarter of section 27. He alleges that John P. Mitchell bought the land at the public sale of lands ordered by the President for that district, and paid for it, and had the receipt of the register and receiver, and that it was afterward sold under a valid judgment and

execution against Mitchell, and the title of said Mitchell came by due course of conveyance to him, said Davis.

It will thus be seen, that, while Moore and Davis each assert title to a different forty acres of the land covered by Bunn's mortgage to his brother, neither of them claim under or in privity with Bunn's title, but adversely to it.

But as both parties assert a right to the land under purchases from the United States, and since their rights depend upon the laws of the United States concerning the sale of its public lands, there is a question of which this Court must take cognizance.

As regards Moore's branch of the case, it seems to us free from difficulty.

The evidence shows that the forty acres which he claims was struck off to him at a cent or two over $2.50 per acre, at a public land sale, by the officers of the land district at Danville, Ill., November 15, 1855; that his right to it was contested before the register and receiver by Bunn, who set up a prior pre-emption right. Those officers decided in favor of Bunn; whereupon Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the register and receiver, and on this decision a patent for the land was issued to Moore, who has it now in his possession.

Some time after this patent was delivered to Moore, Bunn appealed from the decision of the Commissioner to the Secretary of the Interior, who reversed the Commissioner's decision and confirmed that of the register and receiver, and directed the patent to Moore to be recalled, and one to issue to Bunn. But Moore refused to return his patent, and the Land Department did not venture to issue another for the same land; and so there is no question but that Moore is vested now with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver, and that taken in the present suit, any just foundation for Bunn's pre-emption claim. We will consider this point more fully when we come to the Davis branch of the case.

Taking this for granted, it follows that Moore, who has the legal title, is in a suit in chancery decreed to give it up in favor of one who has neither a legal nor an equitable title to the land.

The Supreme Court of Illinois, before whom it was not pretended that Bunn had proved his right to a pre-emption, in their opinion in this case place the decree by which they held Bunn's title paramount to that of Moore on the ground that to the officers of the Land Department, including the Secretary of the Interior, the Acts of Congress had confided the determination of this class of cases; and the decision of the secretary in favor of Bunn, being the latest and the final authoritative decision of the tribunal having jurisdiction of the contest, the Courts are bound by it, and must give effect to it: Robbins *v.* Bunn, 54 Ill. 48.

Without now inquiring into the nature and extent of the doctrine referred to by the Illinois Court, it is very clear to us that it has no application to Moore's case. While conceding for the present, to the fullest extent, that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Dapartment to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the land office. Not only has it passed from the land office, but it has passed from the Executive Department of the government. A moment's consideration will show that this must, in the nature of things, be so. We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver and commissioner are created mainly for the purpose of supervising the sales of the public land; and it is a part of their daily business to decide when a party has by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is sub-

ject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel, or annul the instrument which he has made and delivered. If fraud, mistake, error, or wrong has been done, the Courts of Justice present the only remedy. These Courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured, this is the proper course.

"A patent," says the Court, in United States *v.* Stone, 2 Wall. 525, "is the highest evidence of title, and is conclusive as against the government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England, this was originally done by *scire facias;* but a bill in chancery is found a more convenient remedy." See, also, Hughes *v.* United States, 4 Wall. 232; s. c. 11 How. 552.

If an individual setting up claim to the land has been injured, he may, under circumstances presently to be considered, have his remedy against the party who has wrongfully obtained the title which should have gone to him.

But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed, and delivered to and accepted by the grantee. It is a matter of course that, after this is done, neither the secretary nor any other executive officer can entertain an appeal. He is abso-

lutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title.

If such a power exists, when does it cease? There is no statute of limitations against the government; and if this right to reconsider and annul a patent after it has once become perfect exists in the Executive Department, it can be exercised at any time, however remote. It is needless to pursue the subject further. The existence of any such power in the Land Department is utterly inconsistent with the universal principle on which the right of private property is founded.

The order of the Secretary of the Interior, therefore, in Moore's case, was made without authority, and is utterly void, and he has a title perfect both at law and in equity.

The question presented by the forty acres claimed by Davis is a very different one. Here, although the government has twice sold the land to different persons and received the money, it has issued no patent to either, and the legal title remains in the United States. It is not denied, however, that to one or the other of the parties now before the Court this title equitably belongs; and it is the purpose of the present suit to decide that question.

The evidence shows that on the same day that Moore bought at the public land sale the forty acres we have just been considering, Mitchell bought in like manner the forty acres now claimed by Davis; to wit, November 15, 1855. He paid the sum at which it was struck off to him at public outcry, and received the usual certificate of purchase from the register and receiver. On the 20th day of February, 1856, more than three months after Mitchell's purchase, Thomas I. Bunn appeared before the same register and receiver, and asserted a right, by reason of a pre-emption commenced on the 8th day

of November, 1855, to pay for the south half of the southwest quarter and the south half of the southeast quarter of section 27, which includes both the land of Moore and Davis in controversy in this suit, and to receive their certificates of purchase. They accepted his money and granted his certificate. A contest between Bunn on the one side, and Moore and Mitchell on the other, as to whether Bunn had made the necessary settlement, was decided by those officers in favor of Bunn; and on appeal, as we have already shown, to the commissioner, this was reversed, and finally the Secretary of the Interior, reversing the commissioner, decided in favor of Bunn. But no patent was issued to Mitchell after the commissioner's decision, as there was to Moore; and the secretary, therefore, had the authority, undoubtedly, to decide finally for the Land Department who was entitled to the patent. And, though no patent has been issued, that decision remains the authoritative judgment of the department as to who has the equitable right to the land.

The Supreme Court of Illinois, in their opinion in this case, come to the conclusion that this final decision of the secretary is not only conclusive on the department, but that it also excludes all inquiry by Courts of Justice into the right of the matter between the parties.

The whole question, however, has been since that time very fully reviewed and considered by this Court in Johnson *v.* Towsley, 13 Wall. 72. The doctrine announced in that case, and repeated in several cases since, is this:

That the decision of the officers of the Land Department, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in Courts of Justice, when the title afterward comes in question. But that in this class of cases, as in all others, there exists in the Courts of Equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those

officers have, by a mistake of the law, given to one man the land which on the undisputed facts belonged to another, to give appropriate relief.

In the recent case of Shepley *et al. v.* Cowan *et al.*, 91 U. S. 340, the doctrine is thus aptly stated by Mr. Justice FIELD: "The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the Courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

Applying to the case before us these principles, which are so well established and so well understood in this Court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the Land Department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it.

In the recent case of Atherton *v.* Fowler (*supra*, page 513), we had occasion to review the general policy and course of the government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy, the Act of September 14, 1841, which for the first time established the general principle of pre-emption, and which has remained the basis of that right to this day, while it allowed persons to make settlements on the public lands as

soon as the surveys were completed and filed in the local offices, affixed to such a settlement two conditions as affecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the fourteenth section of that Act:

"This Act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the President, nor shall any of the provisions of this Act be available to any person who shall fail to make the proof of payment and file the affidavit required, before the commencement of the sale aforesaid:" 5 Stat. 457.

There can be no misconstruction of this provision, nor any doubt that it was the intention of Congress that none of the liberal provisions of that Act should stand in the way of a sale at auction of any of the public lands of a given district where the purchase had not been completed by the payment of the price before the commencement of the sales ordered by the President's proclamation. We do not decide, because we have not found it necessary to do so, whether this provision is applicable under all the pre-emption laws passed since the Act of 1841, though part of it is found in the Revised Statutes, § 2282, as part of the existing law. But we have so far examined all those laws enacted prior to November, 1855, the date of Mitchell's purchase, as to feel sure it was in full operation at that time. The Act of March 3, 1853, extending the right of pre-emption to the alternate sections, which the government policy reserved in its numerous grants to railroads and other works of internal improvement, required the pre-emptor to pay for them at $2.50 per acre, before they should be offered for sale at public auction: 10 Stat. 244. This was only two years and a half before these lands were sold to Mitchell, and they were parts of an alternate section reserved in a railroad grant. That statute, in its terms, was limited to persons who had already settled on such alternate sections,

and it may be doubted whether any right of pre-emption by a settlement made afterward existed under the law. But it is unnecessary to decide that point, as it is beyond dispute that it required in any event that the money should be paid before the land was offered for sale at public auction.

The record of this case shows that, while Bunn's pre-emption claim comes directly within the provisions of both statutes, they were utterly disregarded in the decision of the Secretary of the Interior, on which alone his case has any foundation.

We have no evidence in this record at what time the President's proclamation was issued, or when the sales under it began at which Mitchell purchased. These proclamations are not published in the statutes as public laws, and this one is not mentioned in the record. But we know that the public lands are never offered at public auction until after a proclamation fixing the day when and the place where the sales begin. The record shows that both Moore and Mitchell bought and paid for the respective forty-acre pieces now in contest, at public auction. That they were struck off to them a few cents in price above the minimum of $2.50, below which these alternate sections could not be sold, and that this was on the 15th day of November, 1855. These public sales were going on then on that day, and how much longer is not known, but it might have been a week, or two weeks, as these sales often continue open longer than that.

Bunn states in his application, made three months after this, that his settlement began on the 8th of November, 1855. It is not apparent from this record that he ever gave the notice of his intention to pre-empt the land, by filing what is called a declaration of that intention in the land office. There is a copy of such a declaration in the record accompanying the affidavit of settlement, cultivation, and qualification required of a pre-emptor, which last paper was made and sworn to February 20, 1856, when he proved up his claim, and paid for and received his certificate. There is nothing to show when the declaration of intention was filed in the office.

Waiving this, however, which is a little obscure in the

record, it is very clear that Bunn "failed to make proof of payment, and failed to file the affidavit of settlement required, before the commencement of the sale" at which Mitchell bought. The statute declares that none of the provisions of the Act shall be available to any person who fails to do this. The affidavit and payment of Bunn were made three months after the land sales had commenced, and after these lands had been sold.

The section also declares that the Act shall not delay the sale of any public land beyond the time which has been or may be appointed by the proclamation of the President. To refuse Mitchell's bid on account of any supposed settlement, even if it had been brought to the attention of the officers, would have been to delay the sale beyond the time appointed, and would, therefore, have been in violation of the very statute under which Bunn asserts his right.

Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction, unless he had also paid or offered to pay the price before the sales commenced.

It seems quite probable that such attempt at settlement as he did make was made while the land sales were going on, or a few days before they began, with the purpose of preventing the sale, in ignorance of the provision of the statute which made such attempt ineffectual.

At all events, we are entirely satisfied that the lands in controversy were subject to sale at public auction at the time Moore and Mitchell bid for and bought them; that the sale so made was by law a valid one, vesting in them the equitable title, with right to receive the patents; and that the subsequent proceedings of Bunn to enter the land as a pre-emptor were unlawful and void.

It was the duty of the Court in Illinois, sitting as a Court of Equity, to have declared that the mortgage made by Bunn, so far as these lands are concerned, created no lien on them, because he had no right, legal or equitable, to them.

The decree of the Supreme Court of that State must be reversed, and the cause remanded to that Court for further proceedings in accordance with this opinion; and it is so ordered.

Smelting Co. *v.* Kemp, 104 U. S. 636.

Patent takes effect from date of issuance, not from delivery: Innes *v.* Crawford, 2 Bibb. 412; Smelting Co. *v.* Kemp, *supra*.

State.

Title by private grant is that which a person acquires by voluntary transfer from another by means of a deed.

CHILES *v.* CONLEY'S HEIRS.

Court of Appeals of Kentucky, 1834.

2 Dana, 21.

Chief Justice ROBERTSON. On a joint and several demise in the name of Arthur Conley's heirs, two of the lessors (now appellees) obtained a verdict and judgment, in ejectment, against William Chiles and others claiming under him, for two undivided seventh parts of a tract of land.

Chiles claimed the land in virtue of a conveyance to him, in 1816, by the heirs of William Hays, who was a patentee, and he also held a deed from some of the lessors, but not from either of those who obtained the judgment.

The precise sources, character, and extent of the claim of the appellees, do not clearly appear; but we may infer that they rely chiefly on a conveyance from William Hays, the patentee, to one Taylor, in 1793, for a part of the land in controversy, and a deed from Taylor to themselves, in 1825; a paper purporting to be a deed from one Bridges to their ancestor, in 1806, for another portion of the land; a sale by the same patentee (Hays) to Bridges, in 1704, and continuous occupancy, under those contracts, from their dates, for a period exceeding twenty, but less than thirty years.

In revising the judgment, the following points only will be specially noticed:

1. On the trial, the Circuit Court refused to permit the

appellants to read the record of a suit in chancery which had been prosecuted by the lessors against the appellant, Chiles, and against the heirs of William Hays and of Bridges and others, for adjusting the title to the land for which this suit was brought; and that decision by the Circuit Judge is now complained of as erroneous.

This Court need not decide whether every part of the record was so totally irrelevant as, on that ground, to be inadmissible as evidence in this case. Whether there is anything in any part of it, that could operate in any way in counteracting any presumption of a conveyance from William Hays to Bridges, or whether, in other respects, it should tend, in any degree, to affect the claim of the appellees, are questions which we shall not consider; because, however the record, if any portion of it were admissible, might operate, there being much of it that would be illegal and irrelevant, the Circuit Court did not err in refusing to admit the record as offered, even had a portion of it been, by itself, admissible for any purpose, or, in any degree, had been proper evidence. Moreover, two of the appellants were not parties to the chancery suit; and unless the record of that suit would be legal evidence against them, it would not be admissible for them. The record does not show certainly what privity exists between those two of the appellants and Chiles, the other appellant.

2. On the motion of the appellees, the Circuit Court gave the following instruction to the jury: "That the deed from Hays' heirs to Chiles passes no title so far as said deed covers the land of Taylor;" that is, the land which Hays had previously conveyed to Taylor. As the deed to Taylor had never been recorded, it was inoperative so far as Chiles was concerned, if he was a *bona fide* purchaser, for a valuable consideration, without notice. Whether he was such a purchaser, and whether at the time of his purchase (that is, when he paid the consideration and obtained his deed), he had notice, express or implied, were questions which the jury, and not the Court for them, had a right to decide. The instruction of the Court was, therefore, erroneous.

3. The Court also gave to the jury the following instruction: "That the instrument of writing from William Bridges to Arthur Conley, dated the 6th of February, 1806, was a deed of bargain and sale, and sufficient to transfer the title of *Hays* to Conley." The writing here alluded to is as follows:

"For value received, I bargain and sell unto Arthur Conley, my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal this 7th day of February, 1806.

"WILLIAM BRIDGES. [SEAL]

"Test:

"THOMAS BOYD,
"JOHN ROBINSON."

The literal import of this writing is that of an executed agreement, or a conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint, and prolix style of modern conveyances by deed. But it is not more laconic or less comprehensive than the ancient Saxon deeds, and is almost as formal and elaborate as the antiquated charters of enfeoffment; and, indeed, its form and style are, in some respects, preferable to the repletion and repetitions which unnecessarily characterize and greatly deform modern deeds of conveyance. It is sealed, and signed, and attested properly; it shows a valuable consideration; it identifies the parties; describes the land, and acknowledges an absolute executed sale in fee of the vendor's right. These constitute a deed of conveyance; and therefore, as this instrument contains no provision or intimation to the contrary, this Court cannot, by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale: Co. Lit. 7, a; 4 Kent's Com. 460–1.

But, nevertheless, the Circuit Court erred in instructing the jury that this deed from Bridges to Conley, "was sufficient to

transfer the title of *Hays* to Conley." It transferred no other title than that which Bridges held; and there is no proof that he had acquired the legal right, unless a conveyance from Hays to him should be *presumed*. But such a presumption, should the facts authorize it, is not, in this case, conclusive and incontrovertible, but is, at the utmost, only of that class denominated "presumptions of *law* and of *fact*;" and which, therefore, may be repelled by facts to be weighed and considered by a jury. Occupancy for twenty years under an executory agreement of purchase, in the absence of any other explanatory or inconsistent facts tending to a contrary conclusion, will, as an artificial deduction of law, create a presumption of a conveyance; and a Court may so inform a jury. But though such a technical effect be given to such a state of fact, nevertheless, the presumption is not of that kind denominated "presumptions of *law*" merely; such as the legal presumption of fraud, or the legal presumption (at common law), of a consideration for every deed, and which could not be resisted, contradicted, or explained, by extraneous facts. As the presumption in this case is not legal only, and therefore inflexible, but is a presumption of both law and fact, and consequently may be rebutted by facts, the Circuit Court ought not to have given the peremptory instruction to the jury, but should, after telling them what the law of the case was, have left the deduction to *them*. The possession was not adverse as long as the agreement, under which it was taken, continued to be executory; for though Bridges had conveyed to Conley, the latter could have held, in contemplation of law, only as the former had. If Bridges held as *quasi* tenant, his vendee held in the same way under the first vendor.

In consequence only of the two errors which have been noticed, the judgment must be reversed, and the cause remanded for a new trial.

Office Grant.

The method of transferring title through officers of the law, as administrators, executors, guardians, sheriffs, etc., hereinbefore considered, is generally known as acquiring title "by office grant."

MENAGE *v.* JONES.

Supreme Court of Minnesota, 1889.

40 Minn. 254.

GILFILLAN, C. J. The Probate Court of Hennepin County granted to Maria L. Gove, of Concord, N. H., as guardian of the estate of Charles Augustus and Jesse Ridgely Gove, of the same place, minors, a license to sell real estate of said minors situated in said county. Pursuant to such license the sale was made and confirmed, and the real estate accordingly conveyed to the purchaser, whose title plaintiff has, as also the title of Maria L. Gove. The defendant claims title under conveyances from Charles Augustus and Jesse Ridgely Gove. The only question is the validity of the guardian's sale. It appears from recitals in the order of license that it was made upon the petition of said Maria L. as such guardian, praying for such license, and upon due proof of notice having been duly published as ordered, and after a full hearing, and a determination that the sale was necessary and for the benefit of the wards.

The principal objection made to the sale is that the Probate Court of Hennepin County had no jurisdiction to grant the order of license. Of course, the sale and conveyance of real estate, whether the property of wards or others, must be made pursuant to the laws of the State in which it is situated. In this case the laws of New Hampshire had nothing to do with the sale. The Court in that State could not authorize it, nor determine whether it ought to be made. That was solely and entirely within the jurisdiction of the Courts, and under the laws, of this State. In the case of a person under guardianship residing out of the State, and having no guardian appointed in it, the foreign guardian may file an authenticated copy of his appointment in the Probate Court for any county in which there is real estate of the ward, after which he may be licensed to

sell real estate of the ward in any county, in the same manner and upon the same terms and conditions as are prescribed in the case of a domestic guardian: Gen. St. 1878, c. 57, § 32. The Probate Court of Hennepin County (there being real estate of the ward situated in that county) was, then, the proper Probate Court to which to apply for license to sell the real estate. It was the "Probate Court having jurisdiction," as those words of the statute have been construed by this Court: Montour *v.* Purdy, 11 Minn. 278, 384; 88 Am. Dec. 88; Rumrill *v.* First Nat. Bank, 28 Minn. 202; 9 N. W. Rep. 731. This being so, the proposition in Davis *v.* Hudson, 29 Minn. 27, 11 N. W. Rep. 136, that "where a Probate Court possesses general jurisdiction of a given class of subject-matters, the possession of jurisdiction assumed to be exercised in a particular case falling within such class is, in collateral proceedings, presumed," would seem to apply; and the Court in that case held that the presumption could be rebutted only by the record.

It is, however, unnecessary in this case to resort to that rule, for that the Probate Court of Hennepin County had jurisdiction to grant the license appears by the record. It appears that the person claiming to be guardian by the appointment in New Hampshire filed a petition, praying that license to sell the real estate be granted, in the Probate Court of Hennepin County, and that gave jurisdiction after notice, which the record shows, to hear and determine the matter, and grant or refuse such license according to its determination. Upon such hearing it was necessary for the petitioner to show, and for the Court to pass on it, that she was guardian by due appointment of the Court in New Hampshire, and had complied with the law of this State by filing an authenticated copy of her appointment; but a wrong decision, or a decision on incompetent or insufficient evidence, as to those facts, would be only error to be corrected by appeal, and would not affect the jurisdiction. The jurisdiction did not depend on the validity of the appointment in New Hampshire, for nothing done there could give or take away or affect the jurisdiction of the Court in this State. Whether the appointment in that State was valid

or invalid was to be tried and determined on the hearing of the petition for license. The Probate Court in Hennepin County had jurisdiction. All that was necessary to show authority to make the sale was the record in the Hennepin County Court. And had that record been impeachable in this collateral proceeding, the evidence introduced or offered by defendant would have been of no avail to impeach it.

The only other objection to the purchaser's title so serious that we need mention it, is to the deed executed by the guardian. The objections to it are that it does not recite the authority under which it was made, to wit, the license of the Probate Court, and that it does not purport to convey the ward's estate in the land, but runs in the name of the guardian as grantor. The deed certainly is not in the best form. It is about as scant as would be safe to have it. It describes the grantor as the guardian of the two minors, and is executed by her as such; states that the land descended to them from their father, deceased, subject to her (the guardian's) dower; and the dower is expressly excluded from the grant.

There is no reference to the proceedings in the Probate Court of Hennepin County authorizing the sale. Of course, the deed could be of no effect unless executed pursuant to the authority thus given. It is usual in a deed executed by a person not in his own right, but by virtue of authority conferred on him, to recite, or at least make reference to, the authority under which the deed is executed. But as in such case the authority must be shown independent of the deed, however full that may be, it is not absolutely essential that there should be any reference to it in the body of the deed, provided it appears from the entire deed that it was executed pursuant to the authority. Thus in Tidd *v.* Rines, 26 Minn. 201, 2 N. W. Rep. 497, a deed executed by an attorney-in-fact was held good, though there was no reference to the authority, except in the signature of the attorney; and in Berkey *v.* Judd, 22 Minn. 287, that the attorney need not sign his own name—the deed appearing on its face to be the indenture of the principal, made by his attorney-in-fact, designated by name; and in Bigelow *v.* Livingston, 28

Minn. 57, 9 N. W. Rep. 31, it was held good, though the seal might of itself be taken to be that of the attorney—the whole instrument showing it was intended as the seal of the principal. And so in this case, as it was necessary (without regard to the form of the deed) to introduce the record of the Probate Court, it appears beyond any question that the deed was executed pursuant to the license. We hold the deed to be good, so far as concerns that objection.

In making the other objection, to wit, that the deed runs in the name of the guardian as grantor, and not in the names of the wards, the appellant confounds deeds executed under authority of, and as agent for, the grantor, in which case the deed must be in the name of the principal, and those executed upon judicial sales, as sheriffs' deeds, executors' or administrators' deeds, or guardians' deeds, which are made by the person making them in an official character, and not by authority nor as agent for the owner. In regard to these deeds, Freeman, in his work on Void Judicial Sales, § 47, states the general rule (in the absence of any statute prescribing the requisites of such a deed) thus: "Of course, the deed must be executed with the formalities essential to other deeds, and must show that the person who signs it is acting in an official capacity, and not merely conveying his own title to the property." That appearing, and the power to make it being shown, it is as good as an official deed. We see nothing in any other assignment of error that needs special mention.

Order affirmed.

3 Washburn R. P. 220.

Title passes under deed by delivery.

HAWKES *v.* PIKE.

Supreme Judicial Court of Massachusetts, 1870.

105 Mass. 562.

One Fairchild executed a deed to his son Silas, and left it with the register of deeds for record. After recording it, the register returned it to the

grantor. The deed was never given to Silas, and the day after executing this deed Fairchild executed and delivered a deed of the same land to one Hawkes. Pike held a mortgage on this land executed by Fairchild prior to the two aforesaid deeds. The mortgage was foreclosed, and Hawkes files his bill in equity to redeem. Pike claims that he has no right to do so, as Silas has a deed prior to that of Hawkes, and that he is the only one having the right of redemption.

AMES, J. A deed of real estate, in order to take effect as a conveyance of title, must be delivered by the grantor, and actually or by implication accepted as his own by the grantee: 3 Washb. Real Prop. (3d ed.) 254. No definite or specific formality is prescribed by law, but it must be the concurrent act of two parties. It must appear that the grantor parts with the control and possession of the instrument with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands or is placed at the disposal of the grantee, or of some other person in his behalf: Harrison *v.* Phillips Academy, 12 Mass. 456; Maynard *v.* Maynard, 10 Mass. 456; Elmore *v.* Marks, 39 Verm. 538; Jackson *v.* Phipps, 12 Johns. 418. The register of deeds may have been the person agreed upon as the agent of the grantee, and in such a case a deed left with him for record is sufficiently delivered. But registration of itself does not operate as a delivery, nor does it supersede the necessity of proof of a delivery: Parker *v.* Hill, 8 Met. 447; Samson *v.* Thornton, 3 Met. 275.

In this case there was no delivery directly to the grantee, who was in California at the date of the deed, and we see nothing in the report that shows a delivery to any person for him. The scrivener who drew up the deed at the grantor's request had no authority from the absent grantee, and did not undertake to act for or to represent him. He assumed no trust, and came under no responsibility to him. He was not requested to keep the deed for him, or send it to him. He was employed by the grantor only, and all that he was to do or undertook to do, was in his official capacity of register to record the deed, and the only reason which he gave for not giving it up when called upon, was that the record had been begun but not finished. It was then simply a delivery to the register for

the purpose of registration, which is wholly insufficient to pass any title to the grantee. There was no agent to accept the deed; no delivery to give effect to the deed as a conveyance. On the contrary, it appears from the grantor's testimony, which seems to be uncontradicted, that the delivery which he had in his mind was to take the deed from the register and send it by mail to his son in California.

The letters upon which the defendant relies to show that the grantor intended to convey the property to his son, are not at all inconsistent with a total change of mind before that intention was carried into effect.

Decree reversed.

SMITH ON CONTRACTS, 6; Heffron *v.* Flannigan, 37 Mich. 274; Scrugham *v.* Wood, 15 Wend. 545; Regan *v.* Howe, 121 Mass. 424; Fisher *v.* Hall, 41 N. Y. 416; Stevens *v.* Hatch, 6 Minn. 64; Lansing *v.* Gaine, 2 Johns. 300; Thompson *v.* Easton, 31 Minn. 99.

C

TITLE BY DEVISE.

1

WILL.

Title to land by devise is that which a person takes under and by virtue of a will, *eo instanti*, at the death of the devisor.

IVES *v.* ALLYN.

Supreme Court of Vermont, 1841.

13 Vt. 629.

The plaintiff brought an action of ejectment to recover possession of certain lands to which he had acquired title through a will, the evidences of the probate of which were not duly recorded until after the action was commenced.

REDFIELD, J. No questions are reserved in this case, except those which arise upon the face of the papers introduced by

the plaintiff, for the purpose of showing title to the premises demanded. The only question, therefore, which the Court have deemed it necessary to decide is how far the devises upon which the plaintiff relies can avail him. They were never filed and recorded in any probate office in this State until since the bringing of this suit. At the last term of this Court, in the same case, it was decided that the probate of the wills in the State of Rhode Island could not avail the plaintiff in this State. Since that time the requisite probate has been made in this State.

It is true that the plaintiff must recover upon his title as it existed at the time of bringing suit, but the recording of deeds, necessary to their being read, may be done at any time before the trial. When the deed is recorded it takes effect from the delivery. So in this case, it is the death of the devisor that vests the title. At common law no probate of a devise or will disposing of real estate was required or was of any avail. In this State such probate is indispensable, as the Probate Court have exclusive jurisdiction of the proof of wills, of real as well as personal estate. But this is mere matter of evidence, and if done at any time before the trial the devise takes effect from the death of the devisor.

The question whether the land named in the devise is the same land sued for was one of fact for the jury, and not subject to revision here.

Judgment affirmed.

3 Washburn R. P. 566, § 31; *Ex parte* Fuller, 2 Story, 327; Thieband *v.* Sebastian, 10 Ind. 454.

Lex loci rei sitæ governs in the construction of wills of realty, but *lex domicilii* in wills of personalty: Lynes *v.* Townsand, 33 N. Y. 561; Potter *v.* Titcomb, 22 Me. 300; Kerr *v.* Moon, 9 Wheat. 565; Swearingen *v.* Morris, 14 Ohio St. 424; Richards *v.* Miller, 62 Ill. 454; *In re* Swenson's Est., 55 Minn. 300; Hovey *v.* Walbank, 34 Pac. Rep. 650; 100 Cal. 192; Perkins *v.* McConnell, 36 N. E. Rep. 121.

2

The devisee, though presumed to assent to the devise if beneficial to him, may disclaim the estate, and the devise will then be inoperative as to him.

PERRY *v.* HALE.

Supreme Judicial Court of New Hampshire, 1862.

44 N. H. 363.

One Joseph Hale died testate, having devised certain land to his wife, and upon her death to his son, Edgar Hale, a minor, on condition that he should pay $700 to one of his sisters and $800 to the other. The wife died before Edgar was of age, and his guardian took possession of the land, refusing to pay the legacies until the minor should reach his majority. The plaintiff (one of the sisters, now married to Perry) files her bill in equity to have the legacy declared a charge on the land and payable therefrom.

BELL, C. J. Where a legacy is charged on land, an action of assumpsit, or debt, will lie against the devisee to recover it in certain cases: Piper *v.* Bennett, 2 N. H. 439. To the maintenance of such action it is necessary that the devisee should have accepted the devise, of which the most usual and satisfactory evidence is his entry upon it—his possession and occupation of the devised property: Beecker *v.* Beecker, 7 Johns. 99; Van Orden *v.* Van Orden, 10 Johns. 30; Pickering *v.* Pickering, 6 N. H. 120; Pickering *v.* Pickering, 15 N. H. 290; Kelsey *v.* Western, 2 Comst. 501; Birdsall *v.* Hewlett, 1 Paige, 32; Glen *v.* Fisher, 6 Johns. Ch. 34.

A devisee is presumed to assent to a devise which is apparently beneficial, unless he expressly renounces it; but he may waive, or disclaim the estate, and the devise will then be inoperative as to him: Stebbins *v.* Lathrop, 4 Pick. 33; Touch. 319; Birdsall *v.* Hewlett, 1 Paige, 32. This presumption of assent is never conclusive; neither are acts that indicate a design or intention to accept: Wheeler *v.* Lester, 1 Bradf. 293. If the property devised is subject to a condition or burdened with a charge, the devisee or legatee is allowed a reasonable time and opportunity to judge of the value of the bequest and of the burden of the condition before he decides to accept or

reject it: Ib. But by entering into possession of the property the devisee accepts the gift with the condition: Pickering *v.* Pickering, 6 N. H. 120; and evidence that a third person was in possession, to whom the devisee gave directions as to his remaining and quitting the possession, is sufficient evidence of entry and possession: Tole *v.* Hardy, 6 Cow. 340.

If a legacy is charged on land the land will be subject to the charge, not only in the hands of the devisee, but in those of an assignee: Veazey *v.* Whitehouse, 10 N. H. 409; Leavitt *v.* Wooster, 14 N. H. 550; Pickering *v.* Pickering, 15 N. H. 290; Copp *v.* Hersey, 31 N. H. 317; Harris *v.* Fly, 7 Paige, 421; Nellows *v.* Truax, 6 Ohio N. S. 97.

On every transfer of the whole estate, the grantee, who takes the estate charged with a duty which may arise upon a contingency, or with a continuing duty, which constitutes no debt, or a duty which arises from time to time, may be held by an implied promise to perform the duty or pay the charge which accrues in his time; and perhaps be charged in an action at law. But the remedy against several assignees of different parts of the estate is by bill in equity: Pickering *v.* Pickering, 15 N. H. 290.

In regard to legacies charged on land, Courts of Equity exercise an extensive and in some cases an exclusive jurisdiction: 1 Story Eq. 602.

In equity and at law the personal estate of a testator is held the primary fund for the payment of legacies: Harris *v.* Fly, 7 Paige, 427; Hoes *v.* Van Hoesen, 1 Barb. Ch. 379; Roper on Leg. 163; Leavitt *v.* Wooster, 14 N. H. 565, and cases cited; and it is not relieved from liability in the first instance, where the legacy is made a charge on the real estate, unless such is indicated in the will as the intention of the testator: Hanna's Ap., 31 Pa. St. 53; Glen *v.* Fisher, 6 Johns. Ch. 34; Adams' Eq. 263, n. 1; Patterson *v.* Scott, 2 D., M. & G. 531; Collins *v.* Robbins, 1 D., M. & G. 131; Buckley *v.* Buckley, 11 Barb. 77; Leavitt *v.* Wooster, 14 N. H. 550.

The intention of a testator to first charge the realty with the payment of legacies must be express or clearly implied, not

only as an intention to charge realty but to exonerate personalty: Whitehead *v.* Gibbon, 2 Stockt. 230; Kelsey *v.* Western, 2 Comst. 506; Dodge *v.* Manning, 1 Comst. 298; Livingston *v.* Newkish, 3 Johns. Ch. 325; Tole *v.* Hardy, 6 Cow. 333. The old law is said to have been that the personal estate could not be exempted from the payment of debts and legacies without express words; but it is held sufficient if there appears upon the will a plain intention or necessary implication: Hoes *v.* Van Hosen, 1 Comst. 120. And it is said it is not material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts or legacies or the like: Ib.; Bridgeman *v.* Dove, 3 Atk. 202; 2 Vern. 120; 9 Ves. 444; Roper on Leg. 163. But this would seem to be one of the circumstances to be weighed with others in the will, as indicating the intention of the testator. An absolute and specific disposition of all the personal estate of the testator, not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty in exoneration of the personalty: Kelley *v.* Deys, 3 Cow. 133. From the principle that the personal estate is the fund first liable to the payment of legacies, it results that where the personal estate is not intended to be exonerated the receipt by the executor of personal assets, sufficient to pay the legacies, discharges the real estate from further liability for the payment of them; and where such assets are wasted or misapplied by the executor the loss falls upon the legatee, and he cannot resort to the real estate upon which the legacy is charged, either in the hands of the devisee or of any purchaser from him: Sims *v.* Sims, 2 Stockt. 168; Glen *v.* Fisher, 6 Johns. Ch. 34; Birdsall *v.* Hewlett, 1 Paige, 32; Willard Eq. Jur. 488.

And it has been held that the purchaser may insist that the legatee shall first exhaust his remedy against the devisee personally, as well as against the personal estate of the testator, where that is the primary fund: Glen *v.* Fisher, 6 Johns. Ch. 34; Dodge *v.* Manning, 1 Comst. 298; though the equity of that rule is not evident.

The rule as to the equitable charge upon the estate devised

is the same, where the devise fails wholly at law, or is not capable of being enforced at law, as if the estate is devised to the heir-at-law, or to a stranger, upon condition that he pay the legacy. In the first case the devise to the heir is void at law, yet in equity it is good as an equitable charge upon the land of the heir, who is directed to pay it: Smith *v.* Atherley, 3 Rep. in Ch. 93; s. c., Freem. Ch. 36; and in the next case, if the stranger renounces the estate upon which the devise as to him becomes inoperative, yet the equitable charge remains, so, though a stranger cannot enter upon the land on breach of the condition, the Court will consider the heir-at-law a trustee for the legatee, for the purpose of charging the land with the payment of the legacy: Harris *v.* Fly, 7 Paige, 427.

Though a legatee may elect, or may be compelled to resort to the personal estate, as the fund first liable to the payment of a legacy, yet the legatees of the personal estate, thus applied, will in equity be entitled to stand in the place of the legatees whose legacies were charged on the land as against the land itself: Adams Eq. 263, n. 1; Patterson *v.* Scott, 2 D., M. & G. 531; Lockwood *v.* Stockholm, 11 Paige, 87; Crider's Ap., 11 Pa. St. 72.

Some decisions in this State seem in conflict with the principles before stated, that the legatee whose legacy is charged on land cannot charge the land if there is sufficient personal assets. In Leavitt *v.* Wooster, 14 N. H. 566, GILCHRIST, J., says: "In the case of Gookin *v.* True, 3 N. H. 288, an action was brought on a probate bond to recover certain legacies charged on land, where the devisees of the land had entered upon it. It was held that the legacies could not be considered a charge upon the estate generally, which the executor was bound to pay; that their non-payment was not a breach of the bond, and that the action could not be maintained." It is also to be inferred from the case of Veazey *v.* Whitehouse, 10 N. H. 410, that where the charge is upon the land the executor is not liable upon his bond. An action of assumpsit was brought in that case against the assignee of the land charged with the support of the testator's daughter, and maintained;

and such was the case also in Pickering *v.* Pickering, 6 N. H. 120. The first of these cases, however, is reconciliable with the principle before stated. The testator devised to his executor so much of his personal estate as should be sufficient to pay his debts and incidental charges, and if any remained it should be the property of A. D. He gave his real estate to his son, and directed that he pay S. B. and H. D. fifty dollars each, and the action was brought on the probate bond to recover these legacies. The case falls within the rule before stated, that an absolute and specific disposition of all the personal estate shows an intent to charge the real and exonerate the personal property. In the second case no question was made upon the points, and the facts necessary to raise the question are not stated. The third case was against an assignee of the real estate, and it was not suggested that there were personal assets or that the assignor was responsible.

If the Court adopt the rule that the personal estate is the fund first chargeable for the payment of legacies, as there is nothing stated in the bill as to the personal except the household furniture, it may be necessary to amend the bill, so as to show that there was not sufficient personal estate to pay the legacies, or that it was specifically bequeathed to others. It is not necessary perhaps now to decide this point.

The answers in this case present two points, which are relied on as matter of defense: First, that the defendant, the devisee, had never accepted the devise nor been in possession of the devised estate; the other, that it was the intention of the testator to give his son till he should be twenty-one years of age to determine whether he would accept the estate.

The minority of the devisee precludes his personally doing any valid act to bind himself to his prejudice, and it is not pretended that he has done anything to affect his right. The estate remained in the hands of his mother during her life, and after her death the plaintiff, George S. Perry, as guardian of the devisee, entered into possession of the estate, and continued to occupy it till his resignation, in January, 1861, since which time it has been in possession of a trustee appointed by

the Court of Probate, under the will, to fill the place of the executors. It cannot be supposed that this trustee has any such relation to the devisee as would make the possession of the trustee an acceptance of the devise to bind the devisee. We have found no decision that a guardian of a minor has authority to accept or reject a devise made to his ward, so as to bind his estate. Ordinarily, a guardian has no right to purchase real estate for his ward, or to sell it, unless under the license of the Court of Probate; and we think that the plaintiff, being himself the guardian, cannot avail himself of his own act as an assent to a devise, which might be most prejudicial to his ward, where his own interest and that of his ward were opposed.

If this were an action at common law the point of acceptance would be vital, since upon it the right of action depends; but in this proceeding in equity nothing depends upon that, except the question whether the devisee shall be charged personally, since the bill has for its object to charge the land as well as the person of the devisee; and a decree may be made to charge the land itself by a sale, though no person appears to be personally chargeable.

As to the other point, the intention to allow the devisee till twenty-one to make his election to accept the devise, it is of no importance as to the charge upon the land, except as it bears upon the question of the time when these legacies are to be paid. The land is liable to the payment in any event. If, by the fair construction of the will, these legacies were payable when this action was commenced, the legatees must have a right to commence proper proceedings to enforce payment of them, whether the devisee had made his election or not; the true nature of the devise being that the testator gave to the legatees so much out of the real estate, and the balance to the devisee. But if the legacies, from the terms or fair construction of the will, were payable only after the devisee should arrive at twenty-one, the bill is prematurely brought. The question is one affecting the interest as well as the right of action, since a legacy draws interest from the time it is payable.

The general rule is that legacies for which no other time of payment is fixed are payable in one year from the decease of the testator. There seems no color to contend that these legacies were so payable, inasmuch as the real estate is given to the widow during her widowhood, and after her death, or marriage, to the devisee on condition that he pay these legacies.

This is one of the cases where the course of events has not fallen out agreeably to the expectation of the devisor. He probably supposed that his wife would live much beyond the full age of her son, as was the reasonable probability; and as is shown by the provision that after the son should arrive at twenty-one he and his mother should have the management of the property. In that event the legacies might be payable when the estate should vest in possession of the son by the death of his mother, which might be an early or a very distant day; or when the devisee should arrive at twenty-one. It would seem unreasonable to impose on the son the payment of these legacies, when he should arrive at twenty-one, when the whole of the property was given to the widow for a term which the testator expected to continue after that time, and which might continue for so long a time that the payments and the interest might far exceed the value of the property. The natural construction would seem to be that the son should become liable to pay the legacies when he should come into possession of the property by the expiration of his mother's interest, as until that time he would have no means derived from the will to pay the legacies. If this is the just inference as to the testator's intention in the events which he anticipated, it seems equally just as the contingencies have occurred. By the death of the widow the son became entitled to the benefit of the property, and the means to pay the burdens upon it, and no reason is seen why his sisters should not at the same time become entitled to their shares of it; that is, to their legacies, unless it may be found in the provision that the executors should manage and carry on the farm till the son, Edgar, became of age; but we think it cannot have that

effect. The executors were to carry on the farm during the life of the widow, as well as after, and nothing in the will indicates that they were so to carry it on for the benefit of themselves, or any other person than the widow while her estate continued, and then of her son. They must, therefore, be deemed trustees for her, and after her death equally trustees for Edgar, and their possession for all substantial purposes must be his possession, since they must be accountable to him for the income.

There must be a decree in favor of the plaintiffs, charging the land, the form of which, unless the parties agree, will be directed by the Court.

May a devisee disclaim to the disadvantage of his creditors? Stebbins *v.* Lathrop, 4 Pick. 33.

The devisee takes the land subject to all burdens: Wilkinson *v.* Leland, 2 Pet. 658.